

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

DOCTORAL TERM, 1914.

No. 231.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.
ADDIE KELLY, AS ADMINISTRATRIX OF MATT KELLY,
DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

FILED JANUARY 21, 1915.

(34,500)

(24,508)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 321.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

ADDIE KELLY, AS ADMINISTRATRIX OF MATT KELLY,
DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

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a COMMONWEALTH OF KENTUCKY:

Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant and Plaintiff
in Error,

vs.

ADDIE KELLY, as Administratrix of Matt Kelly, Deceased, Appellee
and Defendant in Error.

Appeal from Montgomery Circuit Court.

Pleas before the Honorable Court of Appeals of Kentucky, at the
Capitol in the City of Frankfort, on the 15th day of October, 1914:

Be it remembered that heretofore, to-wit, on the 13th. of March,
1914, the appellant and plaintiff in error, Chesapeake & Ohio Railway
Company, by its counsel, filed in the office of the Clerk of the Court
of Appeals a transcript of record together with a transcript of evi-
dence in which are the following pleadings, etc., directed to be copied
for the Supreme Court of the United States, to-wit:

1 STATE OF KENTUCKY:

Montgomery Circuit Court.

Pleas before the Honorable A. W. Young, Sole Judge of the Mont-
gomery Circuit Court, at the Courthouse in the city of Mt. Sterling,
Kentucky, on the 12th. day of September, 1912.

Be it remembered, that the plaintiff, Addie Kelly, Adm'rx. of
Mat Kelly, did on the 11th. day of June 1912, by and through her
attorneys, O'Rear & Williams, file in the Clerk's office of the Mont-
gomery Circuit Court her original petition herein, which was and is
in the following words and figures, towit:

Montgomery Circuit Court.

ADDIE KELLY, Adm'r'x of Mat Kelly, Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY CO. and GEORGE ROBINSON,
Defendants.

Petition.

The plaintiff, Addie Kelly, Administratrix of Mat Kelly, says
that on June 28th., 1911, her husband Mat Kelly departed this life
intestate under the circumstances hereinafter set forth and that
thereupon she was by the County Court of Montgomery County,

which was the County of the residence of said Mat Kelly at the time of his death, duly appointed as his administratrix, and thereupon she duly qualified and entered upon her duties as such, and she is now the duly appointed, qualified and acting administrator of said estate.

She says that she is a citizen of and resides at Mt. Sterling in Montgomery County, Kentucky.

That the defendant, Chesapeake & Ohio Railway Company is and was on the date aforesaid, a corporation duly organized and existing under the laws of the state of Virginia, and as such has and had the power to and was on the date of the death of said Kelly owning and operating a line of railroad tracks and system of railroad trains, locomotive engines and general equipment for operating its railroad, which ran from Lexington, Ky., into and through Montgomery County, Kentucky, and thence east through the state of Kentucky West Virginia and other states. She says that defendant Chesapeake & Ohio Railway Company is and was at the time of her intestate's injury as hereinafter set forth, a common carrier by railroad engaged in commerce between the several states and territories and the District of Columbia, and that her intestate was at said time employed by said Chesapeake and Ohio Railway Company in such interstate Commerce, and that her said intestate at said time was engaged in the performance of his duty under said employment.

She says that on the 28th. day of June, 1911, the said Mat Kelly whilst engaged in the operation of a locomotive engine under the employment aforesaid and whilst engaged in the performance of his duty under said employment was on account of the negligence and carelessness of the officers, agents and employees of said carrier and by reason of defects and insufficiencies of its railbed, rails and tracks, and of its engine appliances and machinery, caused to be so injured that he immediately died.

Plaintiff says that at and before the injury to her intestate, the defendant George Robinson was employed as the Master Mechanic for his co-defendant, Chesapeake & Ohio Railway Co., and he was in charge of and had the direction and control of a certain locomotive engine No. 143 and under the scope and rules of his employment, it was his duty and he had the right to designate and direct what engine, the engineers, including the plaintiff's intestate should use.

She says that said George Robinson negligently and carelessly ordered and directed plaintiff's intestate to take said engine No. 143 and use the same in hauling a train over the C. & O. tracks between Lexington and Ashland at a time when said Robinson knew, or by the exercise of ordinary care could have known that the road-bed, rails and track over which he would be required to run, and the engine appliances and machinery which he required him to use, were defective, insufficient and dangerous, in time to have avoided the injury to plaintiff's intestate, but the said defective, insufficient and dangerous condition was not known to said intestate, and could not have been known to him by the exercise of ordinary care in time to have prevented his injury.

Plaintiff says that in endeavoring to use said engine on the track aforesaid under the direction of said Robinson, master mechanic, on account of the defective and insufficient road bed, rails and track, and defective and insufficient engine appliances and machinery, the said engine ran off the track, turned over, and thereby said Mat Kelly was so injured that he immediately died.

Plaintiff says that her said testate was an engineer forty-eight years old and had an earning capacity of two hundred dollars a month, that he could and would have earned that sum per month but for the injury received as hereinbefore described and by which the plaintiff has been damaged in the sum of thirty-two thousand dollars for which and her costs, she prays judgment.

O'REAR & WILLIAMS,

For Plff.

Montgomery Circuit Court.

1st Day Jan'y Term, 20th Day of January, 1913:

ADDIE KELLY, Adm'r'x,

vs.

C. & O. Ry. Co.

Amended Petition filed in office January 20th, 1913, is now noted of record.

The Amended Petition referred to in the foregoing order is as follows, to-wit:

Montgomery Circuit Court.

ADDIE KELLY, Administratrix of Mat Kelly, Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Defendants.

Amended Petition.

Comes the plaintiff and for amended petition says that at the time of the accident complained of E. M. Murray was the defendant railway's company's master mechanic at Lexington, Kentucky, and George Robinson was defendant railway company's master mechanic at Ashland, Kentucky; that the accident complained of occurred between Lexington, Kentucky and Ashland, Kentucky; that plaintiff's intestate was sent on the run on which he received his fatal injury by E. M. Murray, George Robinson or some other agent or officer of the defendant railway company, superior in authority to plaintiff's intestate. One of these allegations is true, but plaintiff is unable to state which one of said defendant's officers or agents sent plaintiff's intestate out on said defective engine.—D—

Reiterating all of the allegations of the petition except as

herein qualified the plaintiff prays as in her petition and for her costs.

O'REAR & WILLIAMS,
Attorneys for Plaintiff.

Time of filing and notice of filing waived.

L. APPERSON,
Att'y for Def't Company.

The foregoing Amended Petition is endorsed as follows, to-wit:

Filed in Court Jan'y 20th, 1913. R. J. Hunt, C. M. C. C., By
Anise Hent, D. C.

Montgomery Circuit Court.

2nd Day of January Term, 21st Day of Jan., 1913.

ADDIE KELLY, Adm'r'x,
vs.
C. & O. Ry. Co.

Comes the Chesapeake and Ohio Railway Company and files its answer herein.

The Answer referred to in the foregoing order is as follows, to-wit:

Montgomery Circuit Court.

ADDIE KELLY, Administratrix of Mat Kelly, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Defendants.

Answer of Chesapeake & Ohio Railway Company.

1. For answer in the above entitled action, defendant, Chesapeake & Ohio Railway Company, denies that upon the occasion mentioned in the petition plaintiff's intestate was employed by this defendant in interstate commerce; or that said intestate at said time was engaged in the performance of his duty under said alleged employment; or that on June 28th, 1911, said intestate while engaged in the operation of a locomotive under said alleged employment, or while engaged in the performance of his duty under said alleged employment was injured or killed; or that said intestate was injured or died on account of the negligence or carelessness of the officers, agents or employees of this defendant, or of any of them, or by reason of any defects or insufficiencies of its roadbed, rails or track, or of its engine, appliances or machinery.

It denies that at or before the alleged injury of plaintiff's intestate the defendant George Robinson, was employed as the master mechanic of this defendant, or was in charge of or had the direction or control of the locomotive engine 143 referred to in the petition; or

that under the scope or rules of said Robinson's employment it was his duty, or that he had the right to designate, or direct what engine plaintiff's intestate should use; or that said Robinson negligently or carelessly, or at all, ordered or directed plaintiff's intestate to take said engine No. 143, or use the same in hauling a train over the C. & O. tracks between Lexington and Ashland on the occasion mentioned in the petition; or that said Robinson knew, or by the exercise of ordinary care could have known, that the roadbed, rails or tracks over which said intestate would be required to run, or that the engine, appliances or machinery which said intestate was required to use were defective, insufficient or dangerous, in time to have avoided the injury to plaintiff's intestate; or that he had such knowledge or could have had such knowledge at all; or that he required plaintiff's intestate to use said engine, appliances or machinery.

7 It says that plaintiff's intestate did know the real and actual condition of said roadbed, rails and tracks and of said engine, appliances and machinery.

It denies that on said occasion plaintiff's intestate was endeavoring to use said engine on said track under the direction of said Robinson; or that said engine ran off the track or turned over while said intestate was so doing; or that said engine ran off the track or turned over, or that said intestate was injured or died on account of the alleged defective or insufficient roadbed or track, or the alleged defective or insufficient engine, appliances or machinery; or that said roadbed, rails, track, engine, appliances or machinery were defective or insufficient; and it denies that by reason of the facts alleged in the petition plaintiff has been damaged in any sum whatever.

2. For further answer herein defendant says that at and prior to the time when plaintiff's intestate received the injury complained of in the petition, the said intestate had full knowledge as to the condition of the roadbed, rails and track over which he would be required to run on the occasion referred to, and of the engine, appliances and machinery which he would be required to use on said occasion, and with full knowledge voluntarily undertook to do said work, viz: to run over said roadbed, rails and tracks with said engine, appliances and machinery, and that he thereby assumed whatever risk was involved in so doing.

Having answered said defendant prays to be hence dismissed, with its costs.

SHELBY & SHELBY,
LEWIS APPERSON,

Attorneys for Defendant.

8 Affiant, J. C. McNeal says that he is Passenger and Freight Agent of the above named defendant, Chesapeake & Ohio Railway Company, at Mt. Sterling, Kentucky, and that he believes the statements contained in the foregoing answer are true.

J. C. McNEAL.

Subscribed and sworn to before me by the said affiant this 23 day of Sept. 1912.

LEWIS APPERSON,
Ex. M. Co., Ky.

Montgomery Circuit Court, 5th Day, Jan'y Term, 24th Day of Jan'y, 1913.

ADDIE KELLY, Adm'r'x, &c.,
vs.
C. & O. Ry. Co., &c.

Comes the defendant, George Robinson, and by his attorney, Lewis Apperson and enters his appearance and demurs to the petition filed herein as amended and this case is submitted on said demurrer, and Court advised sustains the same.

(The demurrer referred to in the foregoing Order is as follows, to-wit:)

Montgomery Circuit Court.

ADDIE KELLY, Adm'r'x, &c., Plaintiff,
vs.
C. & O. RAILWAY COMPANY, &c., Defendants.

Demurrer.

Comes now the defendant Robinson, by his attorney Lewis Apperson, and enters his appearance and demurs to the petition filed herein as amended, because it does not state facts sufficient to constitute or support a cause of action against him.

SHELBY & SHELBY &
LEWIS APPERSON,
Att'y- for Def't.

9 Montgomery Circuit Court, 5th Day, January Term, 24th Day of Jan., 1913.

ADDIE KELLY, Adm'r'x, &c.,
vs.
C. & O. Ry. Co., &c.

Comes the plaintiff and files her reply herein.

(The reply referred to in the foregoing order is as follows:)

Montgomery Circuit Court.

ADDIE KELLY, Administratrix of Mat Kelly, Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Defendants.

Reply.

For reply to separate answer of Chesapeake and Ohio Railway Company, the plaintiff says:

A. That E. M. Murray was defendant railway company's Master Mechanic at Lexington, Kentucky, and George Robertson was defendant railway company's master mechanic at Ashland, Kentucky, at the time of the injury to plaintiff's intestate; that each of them were superior in authority to plaintiff's intestate at the time of the injury complained of; and that the accident occurred between Ashland Kentucky and Lexington, Kentucky.

Plaintiff avers that her intestate was sent on the run on which he received his fatal injury by one or the other officers mentioned, or by some other officer superior in authority to plaintiff's intestate, whose name is not known by this plaintiff; that one of these allegations is true, but which one the plaintiff does not know. She further says that her said intestate was sent upon said defective engine by

10 an agent or officer of the defendant railway company, superior in authority to the said Mat Kelly, at a time when said agent or officer knew, or by the exercise of ordinary care should have known the said engine was defective, in time by the exercise of ordinary care, to have prevented the injury to said intestate; and the said intestate did not know that said engine was defective and did not have equal means of knowing with the defendant and its officers and agents superior in authority to plaintiff's intestate that said engine was defective; and the said Kelly relied upon their superior knowledge of the condition of said engine. B.

For further reply plaintiff denies that at or prior to the time when her intestate received the injury complained of in the petition, the said intestate had full or any knowledge as to the condition of the roadbed, rails or track over which he would be required to run on the occasion referred to, or of the engine or appliances or machinery which he would be required to use on said occasion, or that with such alleged knowledge he voluntarily undertook to do said work, namely, to run over said roadbed or rails or track with said engine or appliances or machinery, or that he thereby or at all assumed any risk that was involved in so doing, or any risk whatever.

Wherefore, having fully replied, the plaintiff prays as in her petition and for her costs.

O'REAR & WILLIAMS,
Attorneys for Plaintiff.

11 Montgomery Circuit Court, 5th Day, January Term, 24th
Day of Jan., 1913.

ADDIE KELLY, Adm'r, &c.,

vs.

C. & O., &c.

The plaintiff declines to plead further as to the defendant George Robinson. The petition as to George Robinson is now ordered to be dismissed, and the defendant, C. & O. Railway Company will recover of the plaintiff its cost therein expended.

Montgomery Circuit Court, 1st Day, April Term, 14 Day of April,
1913.

ADDIE KELLY, Adm'r'x of Mat Kelly, Plaintiff,

vs.

CHES. & OHIO RY. CO., &c., Defendant.

Order.

The second amended petition this day tendered is now ordered to be filed and the defendant excepts.

(The second amended petition referred to in the foregoing order is as follows, to-wit:)

Montgomery Circuit Court.

ADDIE KELLY, Adm'r of Mat Kelly, Plaintiff,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Second Amended Petition.

For further amendment to her petition, plaintiff says that her intestate Mat Kelly left surviving him at the time of his death, his widow, Addie Kelly, aged forty-six years, a son Sylvester, aged twenty-two years, a son Carroll aged sixteen years, a son Mat L. aged thirteen years, a daughter Ruth aged eleven years, and a son Tom J. aged nine years, and a son Richard R. aged four years.

12 She says that his widow Addie Kelly, and all of his children except Tom Kelly were in good health, except Tom who had some affection or impairment of his eye eight and was otherwise not very strong, which made his nurture and training an especial object of thought and watchcare to his father, and special thought, watchcare, training and nurture were being given to him by said Mat Kelly, and the same would have been continued by him but for his death.

She says that the decedent Mat Kelly was a strong healthy, able

bodied man, that he was willing and did constantly work, and that he enjoyed in an unusual degree the respect and confidence of his employer: That said Mat Kelly was a good helpful father to each of his children, and was a faithful, sober, good husband. She says that Addie Kelly, the plaintiff herein, and all of said children were dependent upon Mat. Kelly.

She says that his widow and said above named children were supported and the children were being trained morally and physically by said Mat Kelly, that the support and aid which he gave to his wife was of great pecuniary benefit to her, that he gave her not less than \$150.00 per month, and that the intellectual, moral and physical training which he was giving to his children and the support which he was giving them were of great pecuniary benefit, and the same would have continued both as to his wife and to the children but for the death of said Mat Kelly in the manner set forth in the petition. Wherefore, reiterating the allegations of the petition and amendment thereto except as herein qualified, the plaintiff prays for judgment as in her petition and for her costs.

13 O'REAR & WILLIAMS,
Attorneys for Plaintiff.

I am the plaintiff in the foregoing action, & I believe the statements of this amended petition are true.

ADDIE KELLY.

Subscribed and sworn to before me by said affiant *Mattie* Kelly this April 14, 1913.

R. G. KERN,
Notary Public.

Montgomery Circuit Court, 2nd Day, April Term, 15th Day of April, 1913.

ADDIE KELLY, Adm'r'x, &c.,

vs.

CHES. & OHIO RY. Co., &c.

The defendant moved the Court to set aside the order entered herein on yesterday filing the second amended petition, and the Court sustains said motion and in lieu thereof the following order is directed to be entered:

"The plaintiff tendered and offered to file a second amended petition, to the filing of which the defendant objected, the Court overruled the objections and permitted the said pleadings to be filed which is now done, to which the defendant excepted."

(On a day thereafter the following Motion was entered herein, to-wit:)

Montgomery Circuit Court, 3rd Day, April Term, 16 Day of April, 1913.

ADDIE KELLY, Adm'r'x, &c., Plaintiff,

vs.

C. & O. RAILWAY Co., etc., Defendants.

Motion to Set Aside Order.

Comes the defendant, C. & O. Railway Company and moves the Court to set aside the order granted herein on January 24th, 14 1913, ordering the defendant to furnish and produce on the trial certain letters and writings and other things described in said order, which order is entered on page 381 of Order Book No. 73 of this Court.

Montgomery Circuit Court, 2nd Day, April Term, 15th Day of April, 1913.

ADDIE KELLY, Administratrix, &c., Plaintiff,

vs.

C. & O. RAILWAY COMPANY, etc., Defendants.

Motion to Strike Out of Reply.

Comes the defendant C. & O. Railway Company and moves to strike out so much of the reply of plaintiff as is embraced between the letters "A" and "B."

The defendant C. & O. Railway Company, also moves the Court to strike out that portion of the first amended petition as is embraced between the letters "C" and "D."

This cause is submitted on said motion.

Montgomery Circuit Court, 10th Day, April Term, 24th Day of April, 1913.

ADDIE KELLY, Adm'r'x, &c.,

vs.

CHES. & OHIO RY. Co.

Comes the defendant, C. & O. Railway Co. and files its answer to the 2nd amended petition on file herein.

(The answer referred to in the foregoing order is as follows, towit:)

Montgomery Circuit Court.

ADDIE KELLY, Adm'r'x of Mat Kelly, &c., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Answer to Second Amended Petition.

The defendant for answer to the second amended petition says:

15 That it has no knowledge or information sufficient upon which to found a belief that Mat Kelly was a strong, healthy, able bodied man, that he was willing or did constantly work, or that he enjoyed in an unusual degree the respect or confidence of his employer; or that the support or aid which he gave to his wife was of great or any pecuniary benefit to her, or that he gave her not less than \$150.00, or any sum per month, or that the intellectual, moral or physical training which it is alleged he was giving to his children, or the support that he was giving them, was of great or any pecuniary benefit, or the same would have continued either as to the wife or to the children but for the death of said Kelly, in the manner set forth in the petition.

Wherefore, it prays as in its answer.

SHELBY & SHELBY &
LEWIS APPERSON.

Montgomery Circuit Court, 7th Day, Sept. Term, 8th Day of Sept.,
1913.

ADDIE KELLY, Admr'x., &c.,
vs.
C. & O. Ry. Co.

This case coming on for trial and the parties announcing themselves ready, the following jury was empaneled and sworn herein.
towit:

John W. Jones,	A. R. Turley,	J. L. Faulkner,
J. W. Cecil,	Chas. Hailline,	J. T. Johnson,
Geo. M. Roberts,	E. B. Quisenberry,	R. H. Dale, and
R. D. Gaitskill,	Floyd Congleton,	Alvin Myers.

There not being time to complete the trial this day the jury herein was adjourned until tomorrow morning at 9 o'clock.

(On a day thereafter the following order was entered herein,
towit:)

16 Montgomery Circuit Court, 8th Day, September Term, 9th Day of Sept., 1913.

ADDIE KELLY, Admr. of Mat Kelly, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY Co., &c., Defendants.

Upon motion of defendant Chesapeake & Ohio Railway Company, and by consent of plaintiff said defendant now withdraws its traverse of plaintiff's allegations that said defendant is and was at the time of Mat Kelly's injury a common carrier by railroad engaged in commerce between the several states and territories and the District of Columbia; and that said Mat Kelly was at said time employed by said Chesapeake & Ohio Railway Co. in such interstate commerce; and that her said intestate at said time was engaged in the performance of his duty under such employment which employment was to engage in the operation of a locomotive engine engaged in such interstate commerce.

Montgomery Circuit Court, 11th Day of Sept. Term, 12th Day of Sept., 1913.

ADDIE KELLY, Admr., Plaintiff,
vs.
CHES. & OHIO RY. Co. &c., Defendants.

Jury & Verdict.

The jury herein met pursuant to adjournment and after listening to the balance of the argument of counsel retired to their room and afterwards returned into open Court, the following verdict, to wit:

We the jury find for the plaintiff in the sum of \$19,011.00; to be proportioned as follows:

17

Mrs. Addie Kelly	\$7,040
Carroll,	"	1,288
Matt L.	"	1,580
Ruth,	"	2,273
Tom	"	4,371
Richard	"	2,459
Total	19,011

R. H. DALE,
One of the Jury.

(On the same day the following Judgment was entered herein, to-wit:)

Montgomery Circuit Court, 11th Day Sept. Term, 12th Day of Sept.,
1913.

ADDIE KELLY, Administratrix of Mat Kelly, Dec'd, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Judgment.

This cause coming on to be further heard came the jury pursuant to adjournment, whereupon the argument of counsel was concluded. The jury thereupon retired and after consideration returned into Court the following verdict:

"We the jury find for the plaintiff in the sum of \$19,011.00 proportioned as follows:

To Mrs. Addie Kelly.....	\$7,040
Carroll "	1,288
Matt L. "	1,580
Ruth "	2,273
Tom "	4,371
Richard "	2,459
Total.....	19,011

R. H. DALE,
One of the Jury."

18 It is further adjudged by the Court that the plaintiff Addie Kelly, Administratrix of Mat Kelly, deceased, recover of the defendant Chesapeake & Ohio Railway Company the sum of nineteen thousand and eleven dollars, with six per cent. per annum interest from this date for the use and benefit of the members of the said decedent's family as follows: Mrs. Addie Kelly, seven thousand and forty dollars, Carroll Kelly, one thousand, two hundred and eighty-eight dollars; Mat L. Kelly, one thousand, four hundred and eighty dollars; Ruth Kelly, two thousand two hundred and seventy-three dollars; Tom Kelly, four thousand three hundred and seventy-one dollars, and Richard Kelly two thousand, four hundred and fifty-nine dollars, interest to be apportioned in the above proportions.

It is further adjudged that the plaintiff Addie Kelly, Administratrix of Mat Kelly, dec'd, recover of the defendant Chesapeake & Ohio Railway Company, the plaintiff's costs herein expended.

The plaintiff may have execution on this judgment.

To this Judgment the defendant objects and excepts.

(On a day thereafter the following order was entered herein, to wit:)

Montgomery Circuit Court, September Term, 12th Day, 13th Day
of Sept., 1913.

ADDIE KELLY, Administratrix, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY Co., Defendant.

Order.

This day came the defendant and filed its Motion and Grounds for a new trial to which the plaintiff objected and the same being submitted to the Court and the Court — advised overrules same to which ruling of the Court the defendants excepts and prays an
19 appeal to the Court of Appeals which is granted, and the defendant has until and including the third day of the next term of this Court to prepare and file its bill of evidence and bill of exceptions.

(The motion and grounds for a new trial referred to in the foregoing order is as follows, to wit:)

Montgomery Circuit Court.

ADDIE KELLY, Administratrix, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Motion and Grounds for a New Trial.

Comes the defendant and moves the Court to set aside the verdict and judgment rendered herein and grant it a new trial upon the following grounds:

First. Because the verdict is contrary to law and the evidence.

Second. Because the verdict is not supported by the evidence.

Third. Because the verdict is excessive in amount, and appears to have been rendered by reason of the passion — prejudice of the jury.

Fourth. Because the Court erred in permitting the introduction of incompetent evidence offered by the plaintiff, and objected and excepted to at the time by the defendant.

Fifth. Because the Court refused to permit competent evidence offered by the defendant, to which the defendant objected and excepted at the time.

Sixth. Because the Court erred in giving instructions Nos. 2, 4, and 5, offered by the plaintiff to which the defendant objected and excepted at the time, and the Court overruled the objection, to which ruling of the Court the defendant objected and excepted at the time.

20 Seventh. Because the Court erred in not giving a peremptory instruction at the close of the plaintiff's testimony,

to which ruling of the Court the defendant objected and excepted at the time.

Eighth. Because the Court erred in not giving a peremptory instruction at the close of all the testimony, to which ruling of the Court the defendant objected and excepted at the time.

Ninth. Because the Court erred in overruling Instructions Nos. "B" and "D" offered by the defendant, to which ruling of the Court defendant objected and excepted at the time.

Tenth. Because the Court erred in not sustaining defendant's motion to add to the instruction on the measure of damages, a direction to the jury that in estimating the damages to be allowed to the widow and infant children, they should take into consideration decedent's health, physical condition and the hazardous nature of the employment in which he was engaged.

Eleventh. Because the Court erred in not giving Instruction No. 8 offered by defendant, without modifying same with the words: "as may have existed" after the word "conditions" in the last clause of said instruction.

SHELBY & SHELBY,
LEWIS APPERSON,
Att'ys for Deft.

(On a day thereafter the following order was entered herein, to wit:)

Montgomery Circuit Court, Jan'y Term, 3rd Day, 41st Day of
Jan., 1914.

ADDIE KELLY, Administratrix, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY, &c., Defendants.

Order.

This day came the defendant Chesapeake & Ohio Railway Company and tenders its Bill of Exceptions and transcript of the evidence, together with a carbon copy thereof, as given on the
21 trial at the last term of this Court, and moves the Court to file and approve same, and the Court — advised orders same to be filed and marked tendered and offered to be filed "in open Court."

Montgomery Circuit Court.

ADDIE KELLY, Administratrix, &c.,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Agreement.

We agree that the present Judge of the Montgomery Circuit Court may sign the Bill of Evidence and the Bill of Exceptions in this

case to have the same effect as if signed by the Judge who presided at the trial.

O'REAR & WILLIAMS,
Att'ys for Plaintiff.
 LEWIS APPERSON,
Att'y for Defendant.

(The Bill of Exceptions referred to in the foregoing order is as follows, to wit:)

Montgomery Circuit Court.

ADDIE KELLY, Administratrix of Mat Kelly, Plaintiff,
 vs.
 CHESAPEAKE & OHIO RAILWAY CO., &c., Defendants.

Bill of Exceptions.

Be it remembered that upon the calling of this case for trial on the 8th day of September, 1913, the parties announced themselves ready and a jury was duly selected and sworn as follows, to wit:

J. W. Jones.
 A. R. Turley.
 J. L. Faulkner.
 J. W. Cecil.
 Charles Hainline.
 J. T. Johnson.
 George McAlister.
 E. B. Quisenberry.
 R. H. Dale.
 R. D. Gaitskill.
 Floyd Congleton.
 Alvin Myers.

Thereupon counsel for plaintiffs and defendants respectively made a statement of the case to the jury.

The plaintiff then introduced in her behalf in chief, the following witnesses, to wit:

22	Addie Kelly,	Mat Kelly,
	Carroll Kelly,	Tom Kelly,
	Ruth Kelly,	Dr. J. F. Reynolds,
	J. H. Stevenson,	W. H. Rupard,
	G. W. Field,	Tom Carroll,
	Tom Littleton,	J. M. Littleton,
	Dow Williams,	John Salsberry,
	G. W. Littleton,	Silas Coors,
	H. M. Ware,	C. H. Petry,
	T. N. Armstrong,	A. A. Hazelrigg,
	W. A. Samuels,	W. A. Sutton,
	C. D. Grubbs,	J. H. Taulbee, and
	J. G. Winn,	P. K. McKenna.
	Silvester Kelly,	

Thereupon the plaintiff rested her case, and then defendant *then* moved the Court to instruct the jury to find for the defendant. The Court overruled the motion to which ruling of the Court the defendant excepted.

Thereupon the defendant introduced the following witnesses, to wit:

George Robinson.	J. L. Williamson.
E. A. Watkins.	Ernest Montague.
H. G. Hoffman.	W. P. Hobson.
L. F. Frazer.	L. D. Allen.
C. H. Terrill.	

This being all the testimony introduced by the defendant, and the plaintiff declined to introduce any further testimony, the defendant again moved the Court to instruct the jury to find for the defendant. The Court overruled the motion and the defendant excepted to the ruling of the Court.

23 The official stenographer of this Court took down and reported stenographically the testimony of all of said witnesses in full, and the ruling of the Court and the proceedings upon the trial of the case; and has made out and simultaneously herewith filed in Court a full and complete transcript of the evidence and proceedings, together with a carbon copy thereof, which transcript shows in full the testimony of each of said witnesses, the objections made and exceptions reserved at the time by the plaintiff and defendant respectively, to the admission and exclusion of evidence, and the rulings of the Court thereon respectively; which said transcript has been approved by the Judge of this Court, and is hereby certified to be correct, and the same is made a part of this Bill of Exceptions in all respects as fully as if copied herein. The evidence set forth in said transcript is all that was given upon the trial. The exhibits filed in evidence upon the trial, to wit: Exhibit Allen #1, Allen #2 and Model Truck No. 1 are referred to and made a part of the evidence by the transcript of evidence made and filed by the official stenographer of this Court.

This being all the evidence introduced by either party, thereupon at the conclusion of same the defendant offered the following instructions marked "B" and "D".

The Court overruled both of said instructions, to which ruling of the Court the defendant excepted; and which are as follows:

"B" If the condition of the rails at the place of the accident and the character of the engine truck and front driving wheels were such as were, at the time of the accident, generally approved as respects safety by the expert judgment of men of experience and knowledge in railway construction and engine mechanism, the jury are instructed that it was not negligence on defendant's part to use the same, and they should find for defendant.

24 "D" If the jury find for the plaintiff they will fix the damages at that sum which represents the present cash value of the reasonable expectation of pecuniary advantage to the infant children of said Mat Kelly from the continuance of the life of the

decedent Mat Kelly; said sum to embrace only pecuniary advantage to said Addie Kelly during her widowhood and while dependent and pecuniary advantage to said infant children while dependent and until they become twenty-one years of age, and they will apportion the amount so found among said widow and dependent infant children.

In fixing the amount of said damages, if any, the jury cannot award any sum on account of Sylvester Kelly, and cannot award any amount on account of the widow and infant children of said Mat Kelly in excess of the reasonable expectation of pecuniary advantage to said widow and infant children on account of their dependency, if any, and the amount of any pecuniary advantage should be diminished by the amount of whatever income and earning capacity, if any, said widow and infant children have during their periods of partial dependency, if any. In other words no award of damages can be made to said widow and infant children except to compensate them for any sum they might need and might reasonably expect from said Mat Kelly on account of their dependency over and above their income and earning capacity."

Thereupon the Court gave the following instructions to the jury marked 1, 2, 3, 4, 5, 6, 7, 8 & 9, respectively.

"(1) The Court instructs the jury that the defendant Chesapeake & Ohio Railway Company, is a common carrier and as such engaged in carrying commerce between the several states, and was at the time of Mat Kelly's injuries, in the use of the train on which he
25 was engineer, engaging in commerce between the several states and that at said time Mat Kelly was employed in such commerce.

(2) If the jury believe from the evidence that the defendant negligently suffered its engine, appliances, track or road-bed, to be defective or insufficient, and that defendant knew, or by the exercise of ordinary care should have known of such defect or insufficiency if any existed, in time by the exercise of ordinary care to have avoided injury to said Mat Kelly and failed before his injury to remedy the defect or insufficiency, if any, and that as a direct result of said negligence and failure, if any there was, said Kelly received the injury which caused his death, then the jury should find for plaintiff.

If the jury do not so believe and find, they will find for the defendant.

(3) If the jury believe from the evidence that the decedent, Mat Kelly, knew the character of the front driving wheels on the engine in question and the character of its truck and the condition of the track at the place of the accident, and with such knowledge and an understanding of the risks involved in the operation of said engine so equipped over said track, undertook to operate on said occasion the said engine on said track, then he assumes whatever risk of accident from said causes as was involved in so doing and there can be no recovery for the same.

(4) If the jury should find for plaintiff, they should fix the damages at such sum as would reasonably compensate the dependent members of the family of said Kelly, if any there be, for the pecu-

niary loss, if any, shown by the evidence to have been sustained by them because of said Kelly's injury and death. In fixing
 26 said amount, the jury are authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, probable duration of life; and also the pecuniary loss, if any, which the jury may find from the evidence that the dependent members of his family, if any have sustained because of being deprived of such maintenance or support or other pecuniary advantage, if any, which the jury may believe from the evidence they would have derived from his life thereafter.

(5) If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earnings of Mat Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff must be the aggregate of the sum which the jury may find from the evidence and fix as the pecuniary loss as above described, which each dependent member of Mat Kelly's family may have sustained by his death, stating the amount awarded his widow, Addie Kelly, if any, and his infant children Carroll Kelly, Mat L. Kelly, Ruth Kelly, Thomas J. Kelly and Richard Kelly, if any for them, or any of them, but such findings in the aggregate must not exceed \$32[00]*0.00 Dollars. They will not find any sum for Sylvester Kelly. In other words, if the jury find for the plaintiff, you must in your verdict state also the respective amounts awarded each dependent member of decedent's family.

If the jury believe from the evidence that the said family of Mat Kelly had and have any other income — that from the earning capacity of Mat Kelly, they should take into consideration and deduct such income, if any, and as to the infants said recovery must be limited to their infancy or until they arrive at the age of twenty-one years.

And as to Mrs. Addie Kelly, the jury should, if they find anything
 27 for her limit such recovery to the period of her dependence, and in no event for a longer period than her husband Mat Kelly would probably have lived.

(6) Ordinary care is such care as an ordinary prudent person engaged in like business would exercise under the same or similar circumstances.

(7) Negligence is the failure to use ordinary care.

(8) The jury is instructed that a railway company is not an insurer of the safety of its employees, but is bound only to use ordinary care to provide for them a reasonably safe place in which to work, and reasonably safe implements and appliances with which to work.

In this case the jury are instructed to find for the defendant, unless they believe from all the evidence before them. First: that the accident in question was directly and proximately caused by an unsafe condition of the rail over which the engine climbed or by a defective condition of the engine as respects its front driving wheels

[* Words and figures enclosed in brackets erased in copy.]

or the character of its truck, or by a defective condition of the ties at the place of derailment, or by a combination of said conditions, and Secondly, That such of said conditions as may have existed were due to a failure on defendant's part to exercise ordinary care in respect thereof.

(9) Nine or more of the jury may make a verdict, but if less than the whole number agree, all those agreeing must sign the verdict."

To the giving of instructions 2, 4, 5 and 8, the defendant objected. The Court overruled the objection, to which the defendant excepted.

Thereupon the defendant moved the Court to modify instruction No. 4, so that the jury in estimating the damages to be allowed to the widow and infant children, "They should take into consideration decedent's health and physical condition and the hazardous nature of the employment in which he was engaged."

The Court overruled this motion to which the defendants objected and excepted at the time.

The jury after hearing the instructions given by the Court retired and afterwards returned into Court the following verdict:

"We the jury find for the plaintiff in the sum of \$19,011.00 to be proportioned as follows:

To Mrs. Addie Kelly	\$7,040.00
Carroll "	1,288.
Mat L. Kelly	1,580.
Ruth "	2,273.
Tom "	4,371.
Richard "	2,459.
Total	\$19,011.

R. H. DALE,
One of the Jury."

After the rendition of said verdict and within three days thereafter, the defendant moved the Court to set aside said verdict and grant it a new trial of this cause and filed written grounds therefor, which motion and grounds are made a part hereof as fully as if copied herein, and which motion and grounds were taken under advisement by the Court, and afterwards on the 13th day of September 1913, were overruled by the Court, and he refused to give the defendant a new trial of this cause; and judgment was rendered in plaintiff's favor against the defendant in accordance with said verdict, and which said order overruling said motion and grounds for a new trial is made part hereof as fully as if copied herein.

The defendant produced and now tenders this, its Bill of Exceptions, which is now examined, signed and certified to be true, accurate and complete, and the same is ordered to be filed and made a part of this case as fully as if spread at large on the record.

Witness the hand of the said Judge of this Court, this 28 day of January, 1914.

WM. A. YOUNG,
Circuit Judge.

30 Montgomery Circuit Court.

ADDIE KELLY, Administratrix of Matt Kelly, Deceased,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Transcript of Evidence.

Be it remembered, that upon the calling of this case for trial before the Hon. A. J. Kirk, Special Judge of the Montgomery Circuit Court, at the Court House in Mt. Sterling, Kentucky, on September 8th., 1913, both parties announced ready, a jury was duly selected and sworn.

Thereupon counsel for plaintiff and defendant respectively made a statement of the case to the Jury; and thereupon plaintiff introduced in her behalf the following testimony, to-wit:

MRS. ADDIE KELLY, the plaintiff herein, being first duly sworn testified as follows:

(Direct examination by E. C. O'Rear.)

Q. Your name is Mrs. Addie Kelly?

A. Yes, sir.

Q. Are you the widow of Matt Kelly?

A. I am.

Q. When were you married to Mr. Kelly?

A. September 1st. 1888.

Q. When did Matt Kelly die?

A. He was killed on the 28th. of June, 1911.

Q. What time did he leave home that day?

A. Well between the hour of five and five-thirty.

Q. What was his business or avocation?

A. Railroad engineer.

Q. How long had he been engaged in that business?

31 (The foregoing question objected to which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, quite a number of years; long before we were married.

Q. Had he ever since you knew him been engaged in any other business?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir.

Q. What was the state of his health?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He was in splendid health, better than ever before.

Q. What was your age when he died?

A. Forty-five.

Q. What was his age at that time?

(The foregoing question objected to which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Forty-eight.

Q. How many children have you and what were their ages at the time of his death?

A. I have six children. Richard was between the age of three and four, Tom about eight, Ruth about twelve, Matt about thirteen, Carroll fifteen and Sylvester between the age of twenty and twenty-one.

Q. Is there anything the matter with the health of any of your children?

A. Nothing except Tom is a very weak child, needs my constant attention.

Q. What is the matter with Tom?

A. His eyes are very bad and his general health is not strong.

Q. Since Mr. Kelly's death has Tom required any medical attention?

32 (The foregoing question objected to which objection the Court overruled, to which defendant excepts.)

A. Yes, sir, his eyes are bad and need attention; I have him under the care of specialists every once and a while, and a few weeks ago I had his adenoids removed.

Q. What doctors have been waiting on him?

(The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

A. Doctor Thompson and Doctor Reynolds.

The next witness introduced on behalf of the plaintiff was SYLVESTER KELLY, who first being duly sworn testified as follows:

(Direct examination by E. C. O'Rear:)

Q. Your name is Sylvester Kelly?

A. Yes, sir.

Q. You are a son of Matt Kelly?

A. Yes, sir.

Q. How old were you when your father was killed?

A. Twenty-one.

Q. Had you become twenty-one at that time?

A. Yes, sir.

Q. What was the date of your birth?

A. October 21st.

Q. You were born in what year?

A. 1889.

Q. Had you finished your education at that time?

A. I had finished and still had some hopes of going to college.

Q. In what school had you finished?

A. The Ohio Military College.

Q. Any other school?

A. The Public High School.

33 Q. At what age did you go to the Ohio Military Institute?

A. About seventeen.

Q. How long were you there?

A. Two years.

Q. Had you any property at the time of your father's death?

(The foregoing question objected to, which objection the Court sustained.)

(Cross-examined by Lewis Apperson, of counsel for defendant:)

Q. You had been working for yourself for two or three years before your father died?

A. I had been working one place about seven years Judge, off and on; even when I was going away to school when I got back would take up my old job.

The next witness introduced on behalf of the plaintiff was CARROLL KELLY, who first being duly sworn testified as follows:

(Main examination by E. C. O'Rear:)

Q. You are a son of Matt Kelly?

A. Yes, sir.

Q. How old were you when your father was killed?

A. Almost sixteen.

Q. You were fifteen years old?

A. Yes, sir.

Q. How long have you been in school?

A. Since I was six years old.

Q. Are you in school now?

A. Yes, sir.

Q. What School?

A. The Mt. Sterling High School.

Q. What grade?

A. Last year High School.

Q. Senior grade?

A. Yes, sir.

34 Q. Tell the Jury whether or not your father kept all his children at school?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court plaintiff excepts.)

Q. What business are you qualifying yourself for?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court plaintiff excepts, and avows that the witness if permitted to answer would state that he was qualifying himself for Electrical Engineer, and his plan and purpose, after finishing High School, is to take the course of Electrical Engineer in State University.)

Q. After finishing High School do you desire or plan to take further education?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court plaintiff excepts, and avows that the witness if permitted to answer would state that it was his desire and plan to finish his education as Electrical Engineer in the State University.

(Cross-examined by Lewis Apperson, of counsel for defendant:)

Q. When were you born?

A. In the fall of 1895.

Q. What day and what month?

A. The 21st day of November.

Q. When you are not attending school do you do anything?

A. Yes, sir.

Q. What do you do?

A. Sometimes I work in the store and do anything that I can pick up.

Q. How long have you been working in vacation?

A. Since I entered High School four years ago.

35 The next witness introduced on behalf of the plaintiff was MAT KELLY, who first being duly sworn, testified as follows:

Q. Your name is Matt Kelly, Jr.?

A. Yes, sir.

Q. How old were you when your father was killed?

A. Twelve years old.

Q. Are you in school?

A. Yes, sir.

Q. What school?

A. The Mt. Sterling Public School.

Q. How long have you been in school?

A. Since I was seven years old.

Q. What grade are you in now?

A. The Freshman grade.

(Cross-examined by Lewis Apperson, of counsel for defendant:)

Q. When is your birthday?

A. September 7th.

Q. What year?

A. I was born in 1898.

(Re-examined:)

Q. Do you work any between school?

A. I work around home, I have no regular job.

The next witness introduced on behalf of the plaintiff was RUTH KELLY, who first being duly sworn testified as follows:

Q. Your name is Ruth Kelly?

A. Yes, sir.

Q. How old were you when your father was killed?

A. I was ten years old.

Q. When was your birthday?

A. February 8th.

Q. Your are in school?

A. Yes, sir.

36 Q. What school do you attend?

A. Mt. Sterling Public School.

Q. How long have you been in school?

A. This makes my seventh year.

Q. Ruth have you picked out yourself a calling that you want to qualify yourself for?

(The foregoing question objected to, which objection the Court sustained.)

(Cross-examined by Lewis Apperson, of counsel for defendant:)

Q. In what year were you born?

A. In 1901.

The next witness introduced on behalf of the plaintiff was TOM KELLY, who first being duly sworn testified as follows:

(Direct examination by E. C. O'Rear, of counsel for plaintiff:)

Q. How old are you Tom?

A. Ten years old.

Q. How old were you when your father was killed?

A. Between eight and nine.

Q. What is your birthday?

A. The 8th day of March.

Q. Are you in school?

A. Yes, sir.

Q. What school do you attend Tom?

A. The Public School.

Q. What grade are you in?

A. The fourth grade.

Q. How old were you when you started to school?

A. About eight years old.

Q. Can you see well Tom?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

- 37 A. On some occasions I can.
Q. Tom is there anything the matter with you except your eyes?

(The foregoing question objected to, which objection the Court overruled, to which the defendant excepts.)

- A. Yes, sir.
Q. Tom who is that little fellow in Sylvester's lap?
A. Richard.
Q. Is he your brother?
A. Yes, sir.
Q. Do you work any Tom?
A. Sometimes I sell papers.
Q. How long have you been selling papers, Tom?
A. About two years.

The next witness introduced on behalf of the plaintiff was Capt. J. H. STEVENSON, who first being duly sworn testified as follows:

(Main examination by E. C. O'Rear, of counsel for plaintiff:)

- Q. Your name is Capt. J. H. Stevenson?
A. Yes, sir.
Q. What is your business?
A. Conductor.
Q. What railroad company are you employed by?
A. The Chesapeake & Ohio Railway Company.
Q. How long have you been in their service?
A. I have been here about twenty-six years.
Q. Were you in their service before you came here?
A. Yes, sir, I left the service once about three years before I came here.
Q. How long have you been in their service altogether?
A. Well I was in their service from '71 to '81 and then I was away about three or four years and then I have been in their service about twenty-six years down here, making about thirty-six years altogether.
Q. What trains do you run?
A. Well, I run 27-26-29 and 28.
38 Q. Are they the trains that are known as the local passenger trains on the Lexington and Ashland Division?
A. Yes, sir.
Q. How long have you been on that road?
A. I was there until 1896 and then went on the short line over here and stayed ten years and then came back on this division.
Q. Did you know Matt Kelly?
A. Yes, sir.
Q. Did you know him well?
A. Yes, sir.
Q. Did he ever pull your trains?
A. Yes, sir.
Q. Frequently or not?
A. Yes, sir, for about twelve years.

Q. When you were on the short line as you call it, that is what is known — The Kentucky & South Atlantic?

A. Yes, sir.

Q. Was he your engineer during all the time you were on that run?

A. Yes, sir.

Q. I will get you to tell the jury as to Mr. Kelly's ability as an engineer?

A. He was a good engineer as far as I know.

Q. Tell the Jury as to his carefulness, skill and sobriety?

A. I always considered him a careful man.

Q. What about him being a sober man?

A. A sober man too.

Q. What about him being an industrious man?

A. He was an industrious man.

Q. Were you on the train on the 28th day of June, 1911, when Matt Kelly lost his life?

A. Yes, sir.

Q. Were you the conductor in charge of that train?

A. Yes, sir.

Q. I will get you to state where and about what time of day it was that that accident occurred?

39 A. Well, it was about two miles east of Aden and occurred somewhere near 11:20 I believe or 11:18, I don't know the exact time now.

Q. In the morning?

A. Yes, sir.

Q. That train was going East?

A. Yes, sir.

Q. What was your schedule at that time on that train?

A. Thirty miles an hour.

Q. At the time that train left the track at what rate of speed were you running?

A. Between twenty-eight and thirty miles an hour.

Q. What first attracted your attention as to there being anything wrong on that occasion?

A. A jarring of the train and coming to a sudden stop. It was done so quick I hardly knew it.

Q. Where were you on the train?

A. In the colored compartment of the car behind the baggage car.

Q. Were you sitting down or taking fare?

A. I was standing up in the aisle.

Q. Did you feel the air-brakes applied?

A. I felt the train stop, could not tell whether the air-brakes were applied or not; I felt the shaking of the train first.

Q. Describe to the Jury what occurred there?

A. Well the engine run off the track and kept on falling over to the left side until it turned over.

Q. How far did the engine run after it left the rail?

A. Four hundred and ninety feet.

- Q. Did any of the train besides the locomotive leave the track?
A. Well, didn't leave the road-bed, nothing but the engine
40 left the road-bed, but the *track* tore the rail out from under
it and moved all the cars off the track except the hind car.
Q. Were there any passengers injured?
A. No, sir.
Q. When the train came to a standstill did you go out to the front
of it?
A. Yes, sir.
Q. Where that accident occurred describe to the jury how the road
was—was it a straight or curved line?
A. It was on a curve.
Q. What kind of a curve?
A. Not a very steep curve, I don't know the degree.
Q. Which way does the track curve at that point?
A. To the right.
Q. As you were going East?
A. Yes, sir.
Q. Which side of the track did the engine go off?
A. The left side.
Q. The Engineer sits on the right of his cab?
A. Yes, sir.
Q. When the engine turned over which side was beneath?
A. The right side.
Q. When you went to the front of the engine I will get you to
state if you saw Mr. Kelly?
A. Yes, sir.
Q. He was the engineer in charge of that train?
A. Yes, sir.
Q. Where was he when you saw him?
A. Lying under the head of the boiler.
Q. Where with reference to his seat or position?
A. Just back of the seat.
Q. Where were his hands?
A. His hands I think were laying out by the side of him in
front.
41 Q. What was the position of the throttle?
A. I didn't get to see that. It was too hot for me to ex-
amine that.
Q. What was the position of the lever?
A. I didn't get to see that either.
Q. What was the position of the valve that released the air-brake?
A. I didn't notice that.
Q. Was Mr. Kelly living or dead when you got there?
A. He was just breathing his last.
Q. How long did he live after you got there?
A. Not half a minute.
Q. Did he speak after you got there?
A. No, sir.
Q. Who else was on that locomotive at the time of that derail-
ment?

A. Fireman by the name of C. Stump and Mr. Watkins, Road Foreman of engines.

Q. What was Mr. Watkins' position as related to Matt Kelly?

A. He had charge of the engines when they were running over the road.

Q. He was then Matt Kelly's superior?

A. Yes, sir.

Q. For what purpose was he riding the engine?

A. To see if everything was working in good order and plenty of steam on the engine.

Q. Is he here to-day?

A. Yes, sir.

Q. Was he injured in that wreck?

A. He had his leg broken.

Q. Where was he when he got around there?

A. In front of the engine in the ditch.

Q. Where was Mr. Stump?

A. He was maybe twenty or thirty feet further up in the ditch.

42 Q. When you say up——

A. On further east.

Q. Ahead of the engine?

A. Yes, sir.

Q. Was he standing up or lying down?

A. He had gotten up when I got around there.

Q. Had he moved his position?

A. Yes, sir, he was getting back towards the engine.

Q. Was he injured in the wreck?

A. He told me at the time he was not, but I think he went to the hospital afterwards.

Q. Is he here to-day?

A. I haven't seen him.

Q. Is he still in the employ of the Company?

A. No, sir.

Q. Were you ever in Mr. Kelly's home?

A. Yes, sir, two or three times.

Q. Tell the Jury what about his treatment of his family?

(The foregoing question objected to, which objection the Court sustained.)

(Cross-examined by Lewis Apperson, of counsel for defendant:)

Q. Mr. Stevenson who made up that crew for that train that you run?

A. Well, Mr. Kelly engineer, Stump fireman, Lowery brakeman, and I don't remember now who was the baggage man at the time, and I was conductor.

Q. Was that the regular crew that went with that train?

A. Yes, sir.

Q. And that was the same crew every day?

A. Yes, sir, all but the baggage man, he was an extra man.

Q. Did you use the same train and engine every day?

A. Yes, sir.

Q. How long had Mr. Kelly been a member of the crew that operated that train?

A. Ever since the first of January of that year.

43 Q. Had he been running on that run any time before that year?

A. Well he run on that several years before for two or three months, I don't remember how long it was.

Q. Did he run a local or fast train?

A. Local.

Q. Did he operate fast trains at any time?

A. Not that I know of.

Q. Did he ever run on the Louisville division of the Chesapeake & Ohio?

A. He was down there, I don't know whether he run an engine or not.

Q. How long was he there?

A. I don't know how long.

Q. Now in running this train you changed the numbers of it according to the point from which you were running to the point to which you were running?

A. Yes, sir.

Q. You left Mt. Sterling in the morning as number what?

A. Number twenty-seven.

Q. Then when you doubled back to Ashland what number is that?

A. Twenty-six.

Q. Then in leaving Ashland what number is that?

A. Twenty-five.

Q. Then when you get back to Mt. Sterling that night what number is that?

A. Twenty-eight.

Q. Now Mr. Kelly was perfectly familiar with the road?

A. Yes, sir.

Q. In passing over the road he passed over the portion where this accident occurred during the daytime?

A. Yes, sir, every day except Sunday.

Q. Mr. Kelly was perfectly familiar with his engine?

A. Yes, sir.

Q. How long had he been using that same engine on that train?

44 A. Well, I don't remember how long it was; it had been in the shop and come out new when he took the engine.

Q. Do you remember about it coming out of the shop in March before that?

A. I don't remember.

Q. Did he take it out when it first came out of the shop?

A. Yes, sir.

Q. And run it every day during the week from that time up to the accident?

A. Yes, sir.

Q. Did you ever hear of him making any objection to that engine?

A. No, sir.

The next witness introduced on behalf of the plaintiff was Dr. J. F. REYNOLDS, who first being duly sworn testified as follows:

Q. Your name is Dr. J. F. Reynolds?

A. Yes, sir.

Q. What is your profession?

A. Practicing medicine.

Q. Do you make a specialty of any disease?

A. Yes, sir, Ear, eye, nose and throat.

Q. Were you acquainted with Matt Kelly in his lifetime?

A. Yes, sir, I was.

Q. How long have you lived here?

A. Fifteen years.

Q. Had you been a physician in Mr. Kelly's family during his lifetime?

A. I have treated his family for eye trouble and throat trouble.

Q. Are you acquainted with his son, Tom?

A. I am.

Q. Doctor if there is anything physically the matter with Tom will you tell the Jury what it is?

(The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

45 A. He has what is known as nystagmus. It is a jumping of the eyeball, it is never quiet; it is a congenital trouble—that is, he was born with this trouble and will have it as long as he lives.

Q. What is it due to, Doctor?

A. Well every child is born with a trembling eye and some of them have vision enough to take on objects at once; this boy didn't get enough light to fix his eye on objects when he was a baby and it left him in a nervous condition.

Q. Is there anything else the matter with the child?

A. He has had some tonsilitis trouble and adenoids.

Q. Have you treated him for that trouble recently?

A. I operated on him a few weeks ago, removed his adenoids and tonsils.

Q. What was the reasonable charge for that service?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court plaintiff excepts, and avows that the witness if permitted to answer would state that thirty-five dollars was a reasonable charge for the service.)

Q. Doctor is there anything else the matter with the child physically?

(The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

A. Not that I know of; he is a very delicate child.

Q. To what extent, if any, is this child deficient?

(The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

A. Well, he is about forty per cent normal, that is his vision is.

Q. Is it or not trouble that conditions will improve or will it remain the same?

A. It will remain about the same.

Q. How will that affect him as to being able to make a living?

46 (The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

A. Well he will never have the earning capacity that a normal child has or a normal man has. He will never be able to do any mental work, what he has to do will be in the way of hard labor.

Q. Then if he is not physically strong enough to do hard labor how much would you say he was impaired?

(The foregoing question objected to, which objection the Court sustained.)

The next witness introduced on behalf of the plaintiff was G. W. FIELDS, who first being duly sworn testified as follows:

(Direct examination by E. C. O'Rear:)

Q. Where do you live, Mr. Fields?

A. At Hitchins.

Q. In Carter County?

A. Yes, sir.

Q. What is your business?

A. Traveling salesman.

Q. Were you on the local Chesapeake & Ohio train on the morning of June 28th, 1911?

A. Yes, sir.

Q. What first attracted your attention to anything that had happened?

A. The sudden motion of the train, the noise.

Q. Did you hear the air-brakes applied?

A. Yes, sir, that was the first thing I heard.

Q. Describe to the Jury, if you know, what the sound of the emergency air-brake?

A. Well, it has a rather shrieking sound. Any one accustomed to riding on the train would know.

Q. Was it an emergency application or service application?

47 A. It was an emergency application.

Q. Have you ever had any experience in railroading?

A. Yes, sir.

Q. To what extent?

A. I fired for six months.

Q. You know then how the emergency brake is applied?

A. Yes, sir.

Q. I will get you to tell the Jury why the emergency is applied and when and how?

A. Well, to apply the emergency you push the air throttle forward.

Q. Who controls that throttle?

A. The engineer.

Q. After the accident did you go around to the engine?

A. Yes, sir.

Q. What was the condition of the air throttle at that time?

A. It was pushed open.

Q. What would have been the proper condition if the engineer had applied the air in emergency?

A. If the air hadn't been applied it would have been in the center.

Q. How was it?

A. It was pushed back?

Q. Where was Mr. Kelly?

A. Partly under the engine.

Q. Where was he with reference to his position in the cab?

A. Didn't seem that he had ever moved, he was in the same position though rather under the reverse lever.

48 Q. Was he living or dead?

A. He was dead.

Q. What was the position of the reverse lever?

A. It was back, had been reversed.

Q. What was the position of the throttle?

A. It was closed.

Q. Did you examine the track at that point after the accident?

A. I saw it, yes, sir.

Q. Did you notice the ties?

A. Yes, sir.

Q. What was the condition of the ties as to being sound or rotten?

A. They were rotten.

Q. Did you examine rails?

A. Yes, sir, I noticed them.

Q. What was their condition as to being worn?

A. Looked like they had worn an inch or an inch and a half thin.

Q. Are you familiar with the T-rail used on that railroad?

A. Yes, sir.

Q. I will show you a section cut off from the end of a T. rail and ask you how that compares with the condition of the rail as to being worn at that point?

A. Well I think it was worn thinner than that.

Q. I will get you to describe further, if you can, the condition of the rails as to whether there were any shivers or anything of that kind on them?

A. Yes, sir, on the high part of the curve, working up against that pressure.

(Cross-examined:)

Q. You said you fired on some engine—where was that?

A. On the L. & E.

Q. That is the road down here by Winchester?

A. Yes, sir.

Q. Where did you live then?

49 A. At the L. & E. Junction.

Q. That is the only experience you have had on a railroad, the six months?

A. Yes, sir.

Q. You say the throttle was closed?

A. Yes, sir.

Q. And where was the reverse lever?

A. It was thrown back.

Q. I will get you to tell the jury what effect it would have on the engine after the throttle was closed to reverse the lever?

A. Use the reverse lever to reverse the engine.

Q. What effect would it have on the engine if the throttle was closed to reverse the lever?

A. After you close the throttle you shut the steam off.

Q. Then it would not have any effect would it?

A. It would stop the engine.

Q. Would that change any power on the engine if the throttle was closed? When the throttle is closed that shuts off the steam?

A. Yes, sir.

Q. That doesn't give the engine any power at all, does it?

A. I cannot say as to that?

Q. Well if the throttle is closed that cuts the steam off?

A. Yes, sir.

Q. And there is no power given by the steam to the engine?

A. No, sir.

Q. Then there could not be anything accomplished by reversing the lever?

A. Yes, sir, I think there would.

Q. After the throttle was closed?

A. No, sir.

Q. What would be the use of reversing the lever—what would be accomplished by it—what effect would it have on the movement of the engine?

50 A. It would assist it.

Q. How?

A. It would throw the engine back in motion.

Q. What power would throw the engine back?

A. The reverse lever.

Q. Isn't the throttle merely to reverse the flow of the steam?

A. The steam throttle governs the steam.

Q. And if that is cut off the reverse lever would not receive any power from the steam at all, would it?

51 A. It would stop the engine.

Q. The reverse lever is merely for the purpose of turning the steam the reverse way from forcing the engine forward?

A. The reverse lever hasn't anything to do with the steam.

Q. Don't that turn the steam on to give the engine the back motion instead of the forward motion?

A. That turns over with the machinery.

Q. Would the machinery turn at all unless the steam was on it?

A. No, sir, unless you move the steam valve.

Q. Did I understand you to say that the other iron or any of the iron up there was worn more than that?

(Indicating the piece of iron heretofore referred to.)

A. Yes, sir.

Q. Where did you see that?

A. Right along where the accident occurred.

Q. Did you see where the wheels first climbed the rail?

A. Yes, sir.

Q. How far was that from where the engine turned over?

A. Nearly the length of the train.

Q. About how many feet?

A. I would judge some sixty or eighty feet.

Q. Did the wheels make any mark on the rails where the engine first climbed the track?

A. I didn't notice.

Q. How could you tell where it did climb the track?

A. From where it had been off.

52 Q. Do you know whether or not it run on top of the track any distance before it went off?

A. Looked like it was on the ties.

Q. How near to a joint in the rail did you first notice any evidence of the engine climbing the rails?

A. I didn't notice about any joints.

By the Court: I did not understand what the distance was from where the engine first climbed the track to where it turned over?

A. Sixty or eighty feet, might have been further.

Q. What point was it you saw this rail that was worn more than this one? (Indicating the piece of rail heretofore mentioned.)

A. It was back further where the engine had turned over.

Q. Is that the place you saw worn the most?

A. Yes, sir, right on the curve there.

Q. Now where was it that you saw some rotten ties as you say?

A. Where it was torn up.

Q. There were none back where the engine climbed the track, were there?

A. There was rotten ties all along there.

Q. Do you know how long after this accident the rails stayed there where the engine climbed the track without anything being done to them?

A. No, sir.

Q. Do you go over that road often?

A. Yes, sir.

Q. Did you ever take any notice of it?

A. No, sir, I was never off the train there.

Q. Who was at the engine when you got there?

A. I was the first one.

Q. And where were you when the accident happened?

A. In the rear car.

53 Q. How far from the rear end?

A. Four or five seats.

- Q. Anybody back of you?
 A. I could not say.
 Q. Did you go out the rear end of the car or the front end?
 A. I went out the front end.
 Q. How many passengers were in the car?
 A. I don't know; several.
 Q. Did you see the conductor?
 A. Yes, sir.
 Q. Where was he?
 A. He went out on the other side, he wasn't in the rear car.
 Q. You mean he went out on the other side of the train?
 A. Yes, sir.
 Q. Which side did you go out on?
 A. The right side.
 Q. How long had you been at the engine before he got there?
 A. I could not say. I met him down rather in the ditch; he got off on the left and went around; he had to make kind of a circle to get there.
 Q. Any steam flowing out on your side?
 A. Yes, sir.
 Q. How near could you get to the engine?
 A. As close as from here to that table.
 Q. Wasn't hot there?
 A. Not at that time.
 Q. Some steam escaped after you got there?
 A. Yes, sir.

(Re-examined:)

- Q. What part of the rear car were you sitting in?
 A. The fourth or fifth seat back.
 Q. Did you see anybody apply the air brake to that train from that coach?
 54 A. No, sir.
 Q. If in emergency the engineer had tried to stop his train suddenly would it have been necessary for him to have first applied his emergency brakes?

(The foregoing question objected to.)

By the Court: If he knows he may answer.

(To which defendant excepts.)

A. Yes, sir.

Q. And isn't the next thing to shut off his steam?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Then if he wanted to reverse the next thing would be to reverse his lever?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Then the next thing would be to put on the steam again so as to give the application a backward motion?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. But if he got killed before doing that——

By Mr. Shelby: Your Honor please we find it rather hard to tell whether it is the witness or Judge O'Rear who is testifying.

A. No, sir.

(Recross-examined:)

Q. Which side of the track did the engine go off?

A. The left side as you go East.

Q. Was the engine turned over?

A. Yes, sir, rather on her side.

Q. Which side was she on?

55 A. On her right side.

Q. You testified in this case once before?

A. Yes, sir.

Q. Didn't you testify on that occasion that she turned on her left side?

A. I think not.

Q. Do you know?

A. If I did it was a mistake, she turned on her right side. She went on the left side of the track.

Q. On your former examination I will ask you if this question wasn't asked you—"Did you go to the locomotive?" and your answer was, "Yes, sir." And the next question, "Describe its position to the Jury?" And your answer was, "Well when the engine left the track it turned to the left and turned over on her left side and was laying up and down the bank, rather in the ditch."

A. I don't remember whether I said it that way or not, but the engine turned on the left side of the track heading East and was laying on her right side, rather up and down the fill.

Q. You cannot say then whether you made that answer before or not?

A. No, sir.

The next witness introduced on behalf of the plaintiff was W. H. RUPARD, who first being duly sworn testified as follows:

Q. Your name is W. H. Rupard?

A. Yes, sir.

Q. Where do you live?

A. At Grayson.

Q. What is your business?

A. Traveling salesman.

Q. Were you on the Chesapeake & Ohio local train on the morn-

ing that it was wrecked near Aden and Matt Kelly, the engineer, was killed?

56

A. Yes, sir.

Q. Were you a passenger on that train.

A. Yes, sir.

Q. What coach were you in?

A. In the front coach.

Q. What first attracted your attention to the accident?

A. Well, I was looking out the window and the first thing that attracted my attention I suppose was the air or something like that that went on and I looked up and could see the engine and the tender, looked like one was trying to go one way and one the other, and when I saw that I stood up and held to the seat.

Q. Which side of the car were you on?

A. On the right side.

Q. Was your head out the window?

A. Yes, sir, something like that. (Indicating.)

Q. After the train stopped did you go around to the front of the train?

A. Yes, sir, but not right at once.

Q. When you got around there describe the condition of the engine?

A. Well, I walked around on the left hand side of the train this way (indicating) and when I got around there—of course I went around the wreck, there was a lot of hot water &c. there—the engine had turned to the left and the front end had run down this way (indicating) and fell in the ditch or fill to the right.

Q. The engine was lying on her right side?

A. Yes, sir.

Q. Did you see Mr. Kelly?

A. Yes, sir.

Q. Where was he in reference to his position in the cab?

A. Looked like he was just about in his right position.

Q. You know where the engineer rides in his cab?

A. Yes, sir.

Q. Did you notice the position of his hands?

57

A. No, sir.

Q. Did you notice the position of the valve that controls the air in the engine?

A. No, sir.

Q. Did you notice the position of the lever?

A. No, sir, I did not.

Q. He was dead then, of course?

A. Yes, sir, I think so.

Q. After you had seen that did you go back and look at at the place where the train left the track?

A. Yes, sir.

Q. Could you tell where the engine left the track?

A. Yes, sir.

Q. How could you tell?

A. I could tell by a mark where it climbed the rail.

Q. Where the flange of the wheel went across it?

A. Yes, sir.

Q. What kind of a rail was that?

A. It was worn considerably.

Q. How much would you say the ball of it was worn?

A. I presume half of it.

Q. Was it worth as much or more or less than the piece I am now showing you?

A. Just about that much.

Q. Did you notice any of the other rails along on that same curve?

A. Well, I could not say that I did notice them all the way down, but I noticed this right in the curve where the engine went off.

Q. At what point of the curve did it go off? Had the curve begun?

A. It hadn't gotten on the main curve.

Q. Near the beginning?

A. Yes, sir.

Q. Did you notice the ties at that point?

58 A. Yes, sir.

Q. What was their condition?

A. Pretty bad.

Q. What do you mean by "pretty bad"?

A. They were rotten.

Q. Did you see them further down where the tracks and wheels had torn up the track?

A. Yes, sir.

Q. What was the condition of these ties as to being sound or rotten?

A. They were rotten.

Q. How rotten?

A. Well I don't know just exactly how rotten but pretty bad rotten.

Q. Were they rotten enough to tear them loose with your hand?

(The foregoing question objected to, which objection the Court sustained.)

Q. State whether or not any of the spikes were missing before the track was torn up?

A. I could not say about that, I never paid so much attention to that part of it.

Q. What rate of speed was that train running at the time of the accident?

A. Between twenty-five and thirty or thirty five miles an hour, somewhere along there.

(Cross-examined:)

Q. Was the track torn up any where the engine climbed the rail?

A. Well, so, sir, it wasn't.

Q. How far from the joint in the rail did it climb the rail?

A. I could not say, don't remember that.

Q. You don't remember that?

A. No, sir.

Q. How far from where it climbed the rail was it before
59 there was any track torn up?

A. A good little piece.

Q. Well, how far?

A. Do you mean how far it was from the time it climbed the rail
until the rails had dropped?

Q. That tore the track apart.

A. Well, I suppose it was something like the length of the train.

Q. Do you remember how many rails it tore up?

A. No, sir.

Q. How far was it from where the engine first climbed the track to
where it turned over?

A. Well, it was something over the length of the train—a good little
piece, I don't know just exactly how far.

(Re-examined:)

Q. How far was it from the point where you saw the mark on the
rail where it climbed until the wheel went off the rail and marked the
ties?

A. Four or five feet.

The next witness introduced on behalf of the plaintiff was Tom
LITTLETON, who first being duly sworn testified as follows:

Q. Your name is Tom Littleton?

A. Yes, sir.

Q. Where do you live?

A. At Fultz.

Q. In Carter County?

A. Yes, sir.

Q. What is your business?

A. Section Foreman.

Q. For what railroad?

A. Chesapeake & Ohio.

60 Q. How long have you held that position?

A. Altogether for about thirteen years.

Q. In charge of that same section?

A. No, sir, I have been there ten years this fall and I was out here
at Thomson for three years.

Q. How much experience have you had in working railroad sections,
how many years?

A. About twenty years.

Q. For this same Company?

A. Yes, sir.

Q. What is the section you have charge of?

A. Well, it runs from Aden to about half a mile east of Leon, a
little west of Aden. Did at that time, it is a little further this way
now.

Q. How long was that section?

A. Five miles.

Q. Prior to that had the section been shortened?

- A. No, sir, we went down two miles longer before that.
- Q. What are the duties of the Section Foreman?
- A. They are supposed to see after the track and keep it safe.
- Q. Were you acquainted with the condition of this track and its surroundings in the neighborhood of Aden where the local train left the track on the 28th day of June, 1911?
- A. Yes, sir.
- Q. Were you at the scene of that accident there that day?
- A. I was there maybe twenty minutes after it occurred.
- Q. How previously had you been to work on that track?
- A. I don't remember exactly. I generally go over the track once or twice a week.
- Q. What kind of a track is that, straight or crooked?
- A. It is crooked.
- Q. How crooked?
- A. Well there are nineteen curves on the five miles.
- 61 Q. Are they slight curves?
- A. The majority of them are; some are eight degree curves, some six and some as low, well I have some two degrees I believe.
- Q. Is there much straight track on that section?
- A. Mighty little.
- Q. Mr. Littleton is there any difference as to the kind of track that is required on a straight track and a curved or crooked track as to making it safe?
- A. I would think so.
- Q. Tell the jury what it is?
- A. Of course a curved track is supposed to be kept in better condition, the rails should be kept in better shape.
- Q. Why is that?
- A. Because there is more danger of the train rocking the cars off.
- Q. What is the degree of the curve where this left the track?
- A. It was an eight degree curve.
- Q. Is that a considerable curve or not?
- A. A right smart.
- Q. Were you there when those rails were put down on that curve?
- A. Yes, sir.
- Q. When had the rails been renewed on that curve before the accident in which Mr. Kelly lost his life?
- A. I believe it was in the year 1906.
- Q. What is the effect Mr. Littleton of the action of the train on the rails of a curve as to wearing?
- A. It has more ten-ency to wear it going around.
- Q. Wears it where?
- A. Where it lays against the high rail.
- Q. What effect does that have on that rail?
- A. It has enough effect to wear it.
- Q. What effect does it have on the lower rail?
- 62 A. Well, I don't know as I would know more than just the weight of the rail you know.
- Q. What was the condition of the rails on that curve at the time of this accident?
- A. Well, they were worn.

Q. Much or little?

A. About half an inch I expect.

Q. Were they not worn more than half an inch?

A. I don't know.

Q. Were they worn all the same or were some worn more than others?

A. Maybe you could see two rails in a place that were worn a little bit more.

Q. Are all of the rails of the same timber?

A. No, sir.

Q. Don't some wear more than others?

A. Yes, sir, some are safer than others.

Q. What about that kind of a rail—any of these rails on that curve?

A. I don't remember only some were worn more than others.

Q. I will get you to draw there if you will about how much that rail was worn.

A. I don't believe I can draw a rail. You make the rail and I will show you.

Q. Well I will attempt to draw the rail.

A. That is about as near as I can get at it.

Q. You mean this mark you have drawn diagonally across there indicates how much was worn?

A. Yes, sir.

Q. (Counsel exhibits a drawing of the rail to witness which drawing was taken from the rail heretofore shown to the Jury.) I will ask you if this is not an exact reproduction of the size of the rail?

63 A. Yes, sir.

Q. Mark that the way you think it was worn?

A. Yes, sir, I will do so. (Witness marks same.)

Q. That is as much as you think that rail was worn, is it?

A. Yes, sir.

Q. Is that a pretty fair sample of the rail?

A. Yes, sir.

Q. Was any rail worn as much or more or less than this piece I am now showing you?

A. It wasn't worn any more than that one.

Q. Was it worn as much?

A. I guess it was.

Q. Mr. Littleton state whether the track on that curve was worn all the way around that much or not?

A. Yes, sir, I think about the same, unless maybe a rail or two in a place that were worn just a little bit more.

Q. What effect, if any, does the track wearing have on the train?

A. It's according to how short a place it is in.

Q. You know, don't you?

A. Of course if it was worn a little more it would have more effect.

Q. Isn't it a fact that it would rock the train? Isn't that what you mean?

(The foregoing question objected to which objection the Court sustained.)

By the Court: Let him state whether or not he knows first.

Q. Don't you know the effect that track wearing has on a train?

A. Yes, sir.

Q. What?

A. Well if the track was heavy I don't think it would rock the train so bad as it would if it was worn a little bit.

64 Q. Isn't it a fact that it would rock the train? Isn't that what you mean?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I could not say it would rock. If it is level there, if the track has its proper elevation it would sound it but would not rock it.

Q. Don't you know before that it did rock a car off that track there?

(The foregoing question objected to, which objection the Court sustained.)

Q. Didn't you testify on the former trial that that was the effect?

(The foregoing question objected to, which objection the Court sustained.)

Q. Is it necessary in good railroading to have good rails on a straight track?

A. Yes, sir.

Q. Is it necessary to have a better track on a curve than a straight track?

A. Yes, sir, I think so.

Q. Now I will get you to state whether in your opinion these rails on this curve were so worn at the time of this injury that they should have been changed?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, I don't know hardly how to answer that. I had other curves that were worn as bad as this one.

Q. Don't you think they should have been changed too?

A. Well, I expect so, but I didn't ask for the change.

Q. Nevertheless, isn't it your opinion they should have been changed?

A. Yes, sir.

Q. Would not that have been good railroading?

65 A. Yes, sir.

Q. I believe you said you came down there a few minutes after this wreck?

A. Yes, sir.

Q. Before I get to that though. Did you have any other rails there to put in that curve besides what were already in the curve before the accident?

A. I don't remember whether I did or not.

Q. Did you have enough rails there to replace those rails?

A. No, sir.

Q. I will ask you whether you reported to the person in authority over you the condition of the curve before the accident and made any kind of request or recommendation as to furnishing you new rails?

A. If I did I don't remember it.

Q. After this accident on this train did you do anything with those rails, or were you required to do anything with them?

A. They were shipped away.

Q. Where to?

A. To Ashland.

Q. To whom were they shipped?

A. I am not certain but think they were shipped to L. B. Allen, the engineer.

Q. Who handled the rails?

A. I don't know for certain but understand Mr. G. W. Broughton did.

Q. Is he here?

A. Yes, sir.

Q. What is his position?

A. Foreman on the yard.

Q. Did any other train come down there called a wrecking train?

A. Yes, sir.

Q. Who had charge of that?

66 A. I don't remember whether Mr. Deal did or not.

Q. Before those rails left there did you cut off or any of your hands cut off a part of any of these rails?

A. I think there was a section boss next to me that did that.

Q. Did that crew come up and help your crew clear up the wreck?

A. Yes, sir.

Q. Who else was there?

A. Mr. Fox.

Q. Anybody else there?

A. I believe there was, but don't remember.

Q. Mr. Allen there?

A. Yes, sir.

Q. Was this piece cut off while they were there?

A. No, sir.

Q. After they left?

A. Yes, sir.

Q. What was done with it.

A. It was sent to Ashland.

Q. What length piece was it?

A. I don't hardly recollect; reckon I seen it too.

Q. Do you know why it was cut off?

A. By instructions of these people.

Q. Do you know what they wanted to do with it? Did they report to you what they wanted done with it?

A. Mr. Frazer had orders to cut a piece of the rail off and send it to Ashland.

Q. Is that the piece? (Exhibiting piece of rail heretofore shown to the Jury.)

A. It was a longer piece than that; it might have been twelve or fifteen inches long.

Q. What about the condition of these rails as to being pieces or shivers of steel hanging to them.

A. Of course when the rails wear off there will be shivers of steel on them. I have picked them up different lengths, sometimes maybe one-fourth of an inch wide.

Q. How many inches long?

A. Some six inches long and some maybe fifteen and sixteen inches long.

Q. They sometimes hang on to the rail too?

A. Yes, sir.

Q. I am asking you about this particular curve now, were any shivers on this rail you cut a piece off of?

A. I don't remember.

Q. What is this part of the rail called?

A. The ball.

Q. What is the upright part called?

A. The web.

Q. What is this part called (Indicating)

A. The flange.

Q. I will ask you whether some of those rails on that curve were worn down to the web of that curve?

(The foregoing question objected to, which objection the Court sustained.)

Q. How far were they worn down?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

By the Court: He may answer as long as he confines his answer to the place where the engine climbed the rail.

A. I don't hardly know; of course it was worn something like that piece and maybe some worse. I never measured it.

Q. Well, it was worn something like that?

A. Yes, sir, some might have been worse than that.

Q. I want to ask you if you didn't before that change some of those rails right there on that curve at that point to the lower side of the track and turn the rails?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir.

Q. Did anybody do that before you?

68 A. No, sir, they could not very well do that.

Q. I am asking you if you did?

A. No, sir.

Q. Were there any rails replaced on the lower side?

A. Yes, sir.

Q. Where did you get them?

A. From another place.

Q. Not from the same curve?

A. No, sir.

Q. Could that be done?

A. No, sir.

Q. Why?

A. Because if you take one of these rails from the high side and put in on the lower side you can see what a place it would leave.

Q. That is, take out one rail?

A. Yes, sir.

Q. I will ask you if these rails were not worn down to the web?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir, didn't have any that was worn that much.

Q. I will ask you if in addition to that they were not flattened half an inch down?

A. They were flattened some but don't think they were flattened that much hardly.

Q. I will ask you if they were not flattened until some were half an inch lower than others?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I could not say they were flattened that low.

Q. Well, how low?

A. Something like, I have seen it run over half an inch.

69 Q. Would that flatten the ball?

A. Yes, sir.

Q. Wasn't the tendency of that to lower the height of that rail on the lower side?

A. Well what little it mashed down it would.

Q. Now were all of these rails flattened alike or were some flattened more than others?

A. Some were flattened more than others.

Q. If some were flattened more than others, wasn't the effect of that to leave the surface of that track uneven?

A. Well it would if they were flattened down enough.

Q. If the upper side was worn uneven would that give the rocking motion to the train which you alluded to a while ago?

A. It might do it.

Q. Don't you know it would do it?

A. Yes, sir, I expect it would.

Q. Mr. Littleton did you know this engine 143?

A. I have seen her pass.

Q. Did you see her when she didn't pass?

A. Yes, sir, I have seen her when she didn't pass.

Q. Didn't you see her off the track before that?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Where was that?

A. At Leon Tunnel.

Q. How far from this point where this accident occurred?

A. Two miles and about one hundred yards.

Q. Is that on your section?

A. Yes, sir.

Q. Was that derailment on a curve or straight track?

A. It was on a curve.

70 Q. How was that curve as compared with the curve where it went off when Kelly was killed?

A. I don't remember whether that curve was worn as much as that one up there or not.

Q. It was worn?

A. Yes, sir.

Q. What was the degree curve at Leon?

A. That was a six degree curve.

Q. Who was in charge of the engine when it went off up there?

A. Henry Ware.

Q. Now, Mr. Littleton what was the condition of the track at Leon Tunnel at the time this engine went off as compared to the track where the other accident happened?

A. I don't know; the track was in good shape down there.

Q. I will ask you if it was in the same condition or a different condition?

A. I don't know how to answer that.

Q. What about the rails, were they worn as much?

A. Not as much at Leon Tunnel.

Q. They were worn some though?

A. Yes, sir.

Q. When was that derailment at Leon?

A. I don't believe I can tell you.

Q. It was before the accident in which Kelly lost his life?

A. Yes, sir.

Q. How long before?

A. I don't know.

Q. Mr. Littleton what in your opinion caused the engine on which Kelly was injured to leave the track at that point?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, in my opinion some of it was the cause of the engine and some the cause of the rail.

71 Q. What was the matter with the rail?

A. Well, the worn rail.

Q. What was the matter with the engine in your opinion?

A. The ball driver was in front.

(Cross-examined:)

Q. Mr. Littleton how soon after the accident was it before you got down there?

A. Somewhere about twenty minutes.

Q. What position did Mr. Allen occupy there towards the Railroad?

A. Division Engineer.

Q. What position did Mr. Fox occupy there towards the Railroad?

A. Superintendent.

Q. They were both there on the following day?

A. I reckon; they were there the day after the derailment.

Q. Could you tell where the engine first climbed the rail?

A. Well, it climbed the rail—I could not tell exactly.

Q. Could you see any evidence on the rail as to where it climbed it? Did you see any marks on the rail?

A. Yes, sir, it climbed the rail and run on top of the rail.

Q. How far was that from a joint in the end of a rail?

A. I disremember. Appears like it was three or four feet west of the joint.

Q. That was three or four feet before it got to the joint?

A. Yes, sir.

Q. How long did that run on the rail before it got off?

A. If I measured it I have forgotten.

Q. Can you tell how far it was from where you first noticed the marks on the rail to where you saw a mark on the tie on the outside of the rail?

A. I don't know what distance, I never measured it.

Q. Can you give an idea?

A. Something like six or eight feet.

72 Q. Had the truck fallen off?

A. Yes, sir.

Q. Could you tell where it was the ball driver got off?

A. No, sir.

Q. How far was it from the place where the truck got off until you could see the mark of the ball driver?

A. I don't recollect.

Q. How far was it from the point where you first saw the mark on the rail where the engine climbed the rail to the point where the first rail was torn or pushed from its fastening?

A. I don't remember that either.

Q. How many rails were there that were not moved?

A. I left two rails in there.

Q. Besides the rail on which it climbed?

A. That rail and another one.

Q. The rails are thirty-three feet long?

A. Yes, sir.

Q. The other rails after that were taken from the track?

A. Yes, sir.

Q. How many rails were bent and twisted?

A. There were seven rails I didn't use.

Q. Was the next one to the one you left in there twisted?

A. No, sir, we put that back.

Q. Were the rails at the point where the engine turned over sent away from there?

A. Yes, sir, right where the engine went over the bank seven of them rails were shipped away and two of them were left in.

Q. The rails that you left in there, how long did they remain in the track just as you left them?

A. They were relaid the next year.

Q. Was there any change made there at all?

A. No, sir.

73 Q. And you were the section boss during that time?

A. Yes, sir.

Q. Trains running over them every day?

A. Yes, sir.

Q. The same character of trains?

A. Yes, sir.

Q. The same kind of engine?

A. I don't know about that.

Q. Do you know Mr. Williamson?

A. Yes, sir.

Q. Wasn't he running 142?

A. I suppose so, I didn't pay much attention to the engines.

Q. You have never operated an engine?

A. No, sir.

Q. Nor run a train of any kind?

A. No, sir.

Q. Your only experience is about a track?

A. That is all.

Q. It is your duty to keep the track in good order?

A. Yes, sir.

Q. And if it needs new rails whose duty is it to order them?

A. It is my duty when I think they are unsafe.

Q. Did you order any rails for this curve?

A. If I did I have no recollection of it.

Q. At that time did you consider these rails as safe rails?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court plaintiff excepts.)

A. Well, I reckon I did, I didn't order none as I remember of.

Q. And you were over that part of the track two or three times a week?

A. Yes, sir.

Q. Now this time you say this engine was off at Leon Tunnel at what point did the engine leave the track?

74 A. She left the track at this end of the tunnel.

Q. The west end?

A. Yes, sir.

Q. Now isn't it a fact that that end of the tunnel is very low and that you enter it on a curve and that by reason of the height of the tunnel, the low roof of the tunnel, that the upper side of the track cannot be raised high enough for such a curve and that was the reason the engine got off?

A. Well, we put that at a four inch elevation on account of the curve.

Q. Don't you know that the height of that upper side wasn't high enough according to the rules of fixing tracks at that point?

A. It didn't have the proper elevation I don't suppose according to the rules, but that was our instructions how to put it.

Q. Now these rails that were shipped to Ashland, say a piece was taken off by somebody you don't know who?

A. It was taken off by a fellow by the name of Hall.

Q. Did you see it after it was cut off?

A. I think I did.

Q. Do you know of your own knowledge where it was sent to?

A. It was sent to Ashland.

Q. Was that cut off of one of the bent rails?

A. I can't answer that; I am not positive. If it was it was at the end where the engine turned over.

Q. It wasn't cut off where the engine first climbed the——

A. No, sir.

Q. You say there was one rail beyond the point where the engine climbed the rail that was left in. Now from that point back west was the track changed in any way after that?

A. I surfaced it this year.

Q. Just at the beginning of summer?

A. Yes, sir.

Q. Was the track at that time in proper alignment?

75 A. Yes, sir.

Q. Any ties in that part torn up at all?

A. No, sir.

Q. Any ties put in there from that time until you surfaced it up there this year?

A. No, sir.

Q. What was the condition of the ties?

A. They were in good condition.

Q. Sufficient ties there to make the track safe?

A. Yes, sir.

Q. What was the distance from the point where the engine climbed the rail to where it turned over?

A. Three hundred and some feet.

Q. Was any part of the train still on the track?

A. Well, it appears to me that the rear coach maybe wasn't all off the track, I won't say positively.

Q. The running of that train in that accident that day, did it effect the rail upon the lower side in any way?

A. No, sir, I think not. I never changed any rails from the inside.

Q. The rails that you put in were put in on the upper side?

A. Yes, sir.

Q. How many cars composed that train that day?

A. Three I suppose is all.

Q. The engine, baggage car and two coaches?

A. Yes, sir.

Q. Do you know how long a coach is?

A. No, sir, I don't know as I do.

Q. How did you happen to send in those seven rails to Ashland?

A. Just to obey instructions I reckon.

Q. What was their condition?

A. Bent up as well as I recollect; I remember of one being bent.

Q. Were they in condition to put back in the track?

A. Not much.

76 (Re-examined:)

Q. Mr. Littleton the only difference between the seven rails you shipped away and the other you left in the track the seven you shipped away were bent?

A. Yes, sir.

Q. If they had been straight they would have been just as fit for the track as the other two?

A. I never used them.

Q. The reason you didn't take the other two up is just because they were not bent?

A. Yes, sir.

Q. They were just as bad as the seven you shipped away except they were not bent?

A. Yes, sir.

Q. Well they should have been replaced too, should they not?

A. It would have been a better curve if they had.

Q. It would have made a safer track?

A. Yes, sir.

Q. That piece of rail that was cut off wasn't cut off the rail where the engine left the track?

A. No, sir.

Q. You have seen trains and engines run over that track?

A. Yes, sir.

Q. Isn't it your business to know the effect that trains have upon the track and the track upon the trains so you can keep the track right?

A. Certainly.

Q. When did you conclude that those ties were safe?

(The foregoing question objected to, which objection the Court sustained.)

Q. You have stated you thought the ties were in safe condition?

A. Yes, sir.

Q. As a matter of fact, there were a number of rotten ties in there?

77 A. No, sir, not so many where the derailment occurred.

Q. Some on each side though were there not?

A. Might have found some along there.

Q. How many rotten ties would you allow to a rail to make it safe?

A. I don't know how to answer that; how many rotten ties it would take to make it safe.

Q. Well how many safe ties or sound ties?

A. There are eighteen ties to the rail and a man can take twelve sound ties and make a safe rail.

Q. They generally use about eighteen ties to the rail?

A. Yes, sir.

Q. You mean to say that if you had twelve of these ties sound and had six rotten ones it would make a safe track?

A. I would not want the six rotten ones altogether.

Q. Why would you want the six rotten ones at all?

A. Well I wouldn't want them.

Q. How many rotten ones would you be willing to put together?

A. I have had two rotten ones together.

Q. Well how many rotten ties would you want to stand in a place?

A. I would not want to stand much over a couple.

Q. Is it your opinion that a couple of rotten ties together would not make a track unsafe?

A. No, sir, I would not think it would make it unsafe.

Q. Now what is the distance between the ties?

A. It is supposed to be eight inches.

Q. What is the width of the ties?

A. Some of them maybe are seven inches and some ten and twelve.

Q. What is the average width of them?

A. Well I reckon eight inches, or nine anyhow.

Q. Would that not be forty inches from one tie to one tie if you had two rotten ones together?

A. Yes, sir.

78 Q. Three feet and over?

A. Yes, sir.

Q. Now do you think upon reflection that three feet of track unsupported space in those rails is safe on a curve like that?

A. If a tie is rotten like that I take it out of the track. I would not want to leave two rotten ties in there without any bearing.

Q. Don't a tie do something besides support a rail?

A. Yes, sir.

Q. Don't the ties also have hold of the spikes?

A. Yes, sir.

Q. Rotten ties won't hold the spikes?

A. No, sir.

Q. Isn't it harder to hold the ties on a curve than a straight track?

A. Yes, sir.

Q. Now I believe I asked you whether upon a curve there wasn't more strain on the spikes than upon a level track?

A. Yes, sir.

Q. Isn't it more necessary in good railroading to have your spikes in sound ties on a curve than on a straight line?

A. Certainly.

Q. Do you know how much a track gives with one of those large trains going over it?

A. No, sir.

Q. Does give some?

A. It's bound to give a little.

Q. Doesn't it give a right smart?

A. It's according to how a track is put down.

Q. I am talking about that track. Wasn't that a track that would give with those heavy trains going over on those curves?

A. I never noticed.

Q. Did you ever see any of these big engines?

A. I seen a pretty big engine over here.

79 Q. These big twenty-wheelers, you have seen them, haven't you?

A. Have they been over here?

Q. That is what I am asking you.

A. I have——

Q. I will ask you if a few days before the day of this accident wasn't there a big engine that passed over this track called the "Mallory Compound Engine?"

A. Yes, sir.

Q. How many trips did that make?

A. I could not say.

Q. More than one?

A. It made several.

Q. Did they take it off?

A. Yes, sir.

Q. What was the size and weight of that engine as compared with the ordinary engines used on that road?

A. It looked like it was a right smart larger.

Q. Didn't it look twice as large?

A. I don't know whether it looked twice as big or not.

Q. I will ask you if that is a good picture of it? (Counsel exhibits picture of engine to the witness.)

A. Yes, sir.

(Counsel desires to offer picture of the engine to the Jury, to which defendant objects, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Q. Going back to this Leon Tunnel. Did I understand you to say that the track on entering a curve from a straight track is the same degree where it enters as it is at any other point in the curve?

A. No, sir.

80 Q. That isn't true, is it? That is, where it enters is a less degree?

A. Certainly.

Q. Now when you enter either a six or eight degree curve the entrance to the curve is the same isn't it?

A. Yes, sir.

Q. Now isn't it also true that the elevation of the upper rail to the entrance of the two is the same?

A. Yes, sir.

Q. Now when you entered the Leon Tunnel curve wasn't the elevation of that rail the correct elevation to it?

A. I don't remember whether it was or not.

Q. This wreck at Leon didn't occur in the tunnel?

A. No, sir, it had gotten to the four inch elevation.

Q. Now counsel asked you that owing to the low roof of the tunnel if it was not impossible to raise the roof of that tunnel?

A. You could lower it very little.

Q. Was there anything to keep you from lowering the lower side?

A. It would be pretty hard to do it, a man would have to cut through there.

Q. Certainly, but it could be done?

A. Yes, sir.

Q. When did you say you rebuilt this track out there at Aden where this accident occurred?

A. Well, I surfaced that in June.

Q. Of this year?

Q. Since the last term of this Court?

A. Yes, sir.

Q. Did you take out all the rotten ties?

A. I took out all that was necessary.

Q. Did you take out all the rotten ties?

A. Well I took out all the ties that would not last twelve months.

Q. What did you put in their place?

A. White oak ties.

81 Q. New ones?

A. They had never been used.

Q. What about the rails? Did you put down new rails there?

A. No, sir, you see the rails were relaid last year.

Q. Didn't you put new rails on that curve?

A. No, sir.

Q. And you say the rails that are there now were put there when?

A. In 1912.

Q. When you put the seven rails in that were taken out and shipped away what kind of rails did you put in, new ones?

A. No, sir, second-handed rails.

Q. Were they second-handed rails from a curve or straight track?

A. I don't remember.

(Recrossed:)

Q. Mr. Littleton when rails are twisted or bent so they cannot be used in a track does the Company ever have them straightened and sent back?

A. No, sir, not that I know of.

Q. You have been shown a picture of an engine. Do you know whether that is the picture of an engine you saw going up that road or a picture of one like that?

A. I don't know whether it is the picture of it or not, it looks something like it.

Q. Do you know the length of that engine?

A. No, sir.

Q. From the number of wheels you noticed on that how was the

weight distributed? Was the weight of the engine distributed along the whole length of it?

A. It looked to be.

Q. Did you count the wheels?

A. No, sir.

Q. I will get you to tell the jury how many wheels there are to that engine? (Counsel gives the picture of the engine to the witness for the purpose of counting the wheels.)

82 A. There are twelve wheels on this side. (Indicating.)

Q. How many on the other side?

A. Twelve.

Q. Making twenty-four?

A. Yes, sir.

Q. Then the weight of that engine is distributed on twenty-four wheels?

A. Yes, sir.

(Re-examined:)

Q. Did you count the wheels on the tender too?

A. Yes, sir.

Q. Now the wheels under the locomotive proper are only sixteen, eight on a side?

A. Yes, sir.

(Re-recrossed:)

Q. This engine that Mr. Kelly was running was called a ten-wheeler?

A. I can't tell you, I don't know.

Q. Do you remember there were three under the engine on each side and four under the truck like that truck there?

A. Appears like I do. I never paid much attention to the engines, never have anything to do with them.

Q. You don't know what is called a ten-wheeler?

A. No, sir.

(Re-re-examined:)

Q. Do you know Tom Stacey?

A. Yes, sir.

Q. Is he here?

A. No, sir.

Q. He was here last night?

A. He left sometime last night.

Q. Is he one of your section men?

A. No, sir.

Q. Doesn't work for the Company?

A. No, sir.

83 The next witness introduced on behalf of the plaintiff was TOM CARROLL, who first being duly sworn testified as follows:

Q. Your name is Tom Carroll?

A. Yes, sir.

Q. Where do you live?

A. At Aden.

Q. In Carter County?

A. Yes, sir.

Q. How near do you live to the place of the wreck that occurred on June 28, 1911, in which Matt Kelly was killed?

A. In about one hundred and fifty yards then I guess.

Q. How long did you live there?

A. I don't know, about a year I guess.

Q. Is there any road there for your place or did you use the railroad?

A. I used the railroad.

Q. You walked in and out on the railroad?

A. Yes, sir.

Q. What was the condition of that track as to the ties at that point where the train left the track?

A. There were some rotten ties there; the track was repaired a little while before that, took some ties out.

Q. How many rotten ties, if any, were left in there when they repaired it?

A. A few, I never counted them.

Q. What kind of ties did they take out of there? You say they took some out?

(The foregoing question objected to, which objection the Court sustained.)

Q. Mr. Carroll you say you saw some rotten ties in there?

A. Yes, sir.

Q. How were they as compared with those that were taken out?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

84 They were about like the ones they took out I guess.

Q. What kind of ties did they take out?

A. Some rotten ties, you could tear them all to pieces.

Q. How?

A. With your hand, some broke into.

Q. How broke into?

A. Broke into on the heads of the ties where the rail crossed.

Q. Describe the condition of that track where the rails rested on the ties that were left in there as to whether any of them were rotten or broken?

A. I don't know.

Q. Do you know whether any of the spikes were missing in there or not?

Q. No, sir, I don't know.

Q. Do you remember that little steel or iron plate that is under the rail on the tie?

A. Yes, sir.

Q. Do you remember whether any of the spikes were missing out of there or not?

A. I don't know whether any of them were missing out of there or not when the wreck occurred.

Q. What about the rails there?

A. There were worn pretty bad.

Q. Where were they worn?

A. On the side where the wheels run against it.

Q. How near were they worn down to the web?

A. Some of them were worn pretty close to it.

Q. Were the rails worn all alike or differently at different places?

(The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

85 A. No, sir, it was worn about the same.

Q. How about the lower side, how was that worn?

A. That wasn't worn much, only the top was mashed.

Q. Mashed how?

A. Just the top mashed.

Q. Did it make any shivers on either side of them?

A. Yes, sir.

Q. What about the upper side, any shivers there?

A. Yes, sir.

Q. Describe those shivers?

A. Just little shivers of iron cut off, I expect they were about a foot and a half long.

Q. Were there many of them or not?

A. Yes, sir, a good many.

(Cross-examined:)

Q. Say you came down to the wreck?

A. Yes, sir.

Q. Did you see where the engine climbed the rail?

A. Yes, sir, I *sed* where it climbed it, I didn't pay no attention as to how.

Q. Did you see any mark on the rail where the wheel had run on the rail?

A. No, sir.

Q. Did anybody show you where the engine had first left the track?

A. Yes, sir.

Q. Could you see where it first left the track?

A. No, sir, only where it first struck the ties.

Q. Was any part of the train on the track?

A. Yes, sir, the hind end of the coach was on the track.

Q. Where the end of the coach was on the track the track was al- right?

A. Yes, sir, I suppose it was.

86 Q. It wasn't spread any?

A. I don't know whether it was or not, it wasn't spread enough to drop any.

Q. How far was the hind end of the coach from where you wers shown the place where the engine climbed the rail?

- A. I don't know, never measured it.
Q. Give your best judgment?
A. About two hundred or two hundred and fifty feet.
Q. From the rear end of the coach that was still standing on the track to where you were shown the engine climbed the rail you say was two hundred or two hundred and fifty feet?
A. Yes, sir.
Q. From the rear end of the train back to where the engine climbed the rail the track was in good condition?
A. I didn't see much wrong with it.
Q. Trains continued to pass that way every day after that?
A. Yes, sir.
Q. Didn't have any more accidents there?
A. No, sir.
Q. You said something about some old ties being taken out and new ones put in, how long was that before the accident?
A. A month or more.
Q. What kind of ties were put in?
A. White oak.
Q. Did you see any locust ties put in?
A. I never paid any attention to them.

(Re-examined:)

- Q. Do you know anything about that coal car jumping the track since then?
A. I don't know, the car jumped off some place down there but don't know where.
Q. Don't you know there have been several off there?
A. Not since that wreck that I know of.

By Mr. Shelby: Your Honor please, we don't think they should be allowed to go into what has happened since the accident.
87 By the Court: Gentlemen of the Jury you will not consider what has been said in regard to what has happened since the accident.

The next witness introduced in behalf of the plaintiff was Dow WILLIAMS, who first being duly sworn testified as follows:

- Q. Your name is Dow Williams?
A. Yes, sir.
Q. Where do you live?
A. In Carter County.
Q. What is your business?
A. I work on the section.
Q. For the Chesapeake & Ohio Railway?
A. Yes, sir.
Q. What is your business you say?
A. Working for the Chesapeake & Ohio Railway Company at the Aden section.
Q. Under Tom Littleton?
A. Yes, sir.

Q. How long have you been working there?

A. I don't know exactly, about eight years.

Q. Do you remember the occurrence in June 1911, when the local passenger was derailed and Mr. Kelly was killed?

A. Yes, sir.

Q. Were you there that day?

A. No, sir.

Q. Were you there the day after?

A. Yes, sir.

Q. How recently before that had you worked on that track at that point?

A. The day before.

88 Q. Right at that curve?

A. I don't know about that curve. I worked on the section the day before.

Q. What I asked you was how recently before the accident had you worked at that identical point?

A. I don't remember.

Q. When you got there after the accident you saw the rails, did you not?

A. Well, yes, sir, they had the track passable before I got back.

Q. Did you see the rails after they were put back?

A. Yes, sir.

Q. Did you the next day examine the rails where the engine left the track?

A. Yes, sir.

Q. Now state to the jury whether that rail was worn or not?

A. Yes, sir.

Q. How? Just describe it to the Jury.

A. It was worn off one side of the rail.

Q. Much or little?

A. A right smart.

Q. Did you have any new rails there to put in the place of these worn rails before the accident?

A. I don't remember whether we did or not.

Q. What about the lower side of that track at that time as to whether it was worn or not?

A. No, sir, the rail wasn't worn on the lower side.

Q. I am talking about whether it was worn on top or not?

A. It might have been mashed.

Q. Isn't it your recollection that it was?

A. No, sir.

Q. What about the shivers of steel being cut off these rails by the wearing of them at that point?

A. Well, there were shivers cut off of them.

89 Q. How long did I understand you to say you have been working on the section?

A. Eight years.

Q. In your opinion was that worn rail on that curve a safe track?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't know whether it was or not, I hardly think it was.

By the Court: The Jury will not consider the foregoing question and answer as to whether or not the witness considers the track a safe track.

(Cross-examined:)

Q. Mr. Williams what kind of a rail would good and safe railroading have required on that curve at that time? If you know?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court plaintiff excepts.)

A. I don't understand your question?

Q. What kind of a rail should there have been on that curve at that place at that time for good and safe railroading?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court defendant excepts.)

Q. Mr. Williams do you feel like that your experience as a section man, making and repairing railroad tracks, is such that you would know what is reasonably good and safe track on a curve?

(The foregoing question objected to, which objection the Court overruled.)

Q. Well, do you know, Mr. Williams?

A. I think so.

90 (The foregoing answer objected to, which objection the Court sustained.)

Q. Have you any doubt about your knowledge on the point? Do you or not know?

(The foregoing question objected to, which objection the Court overruled.)

A. I won't say that I do.

The next witness introduced on behalf of the plaintiff was J. M. LITTLETON, who first being duly sworn, testified as follows:

Q. Your name is J. M. Littleton?

A. Yes, sir.

Q. Where do you live?

A. In Carter County.

Q. How near to Aden?

A. I expect a mile and a half east of Aden.

Q. What is your business?

A. Farmer.

Q. Do you live near the railroad track of the Chesapeake & Ohio Railway which runs by Aden?

A. Yes, sir, I live in about fifty feet of it.

Q. Do you know where the wreck occurred in June, 1911, when Mr. Kelly was killed?

A. Yes, sir, where they said he was killed, I was sick in bed at the time.

Q. You know the place?

A. Yes, sir.

Q. Have you been over that track at that place frequently or not?

A. I have possibly averaged once a month I expect. My business is mostly the other way on account of the store and postoffice being below me.

Q. Did you notice and examine the rails?

91 A. No, sir, I never did on that curve where his engine went off.

Q. Did you notice the condition of the ties at that place at that time or before the time that the accident occurred in which Mr. Kelly was killed?

A. I don't remember whether I did or not. I noticed a right smart rotten ties from my house to Aden.

Q. I am not asking you about that—I am asking you about the ties at the point where this engine left the track in which Kelly lost his life. Do you know where that was?

A. Yes, sir.

Q. You are the father of Tom Littleton?

A. Yes, sir.

The next witness introduced on behalf of the plaintiff was G. W. LITTLETON, who first being duly sworn, testified as follows:

Q. Your name is G. W. Littleton?

A. Yes, sir.

Q. Where do you live?

A. On Little Sinken.

Q. In Carter County?

A. Yes, sir.

Q. How far from Aden?

A. Two miles, I reckon.

Q. Where did you live in June, 1911, when the train was derailed on which Matt Kelly was killed?

A. At the same place.

Q. What was your business at that time?

A. Section laborer.

Q. For the Chesapeake & Ohio?

A. Yes, sir.

Q. Who was your foreman?

A. T. J. Littleton.

Q. What relation is he to you?

92 A. He is my brother.

Q. How long have you been working on the C. & O. as a section hand?

A. From first to last some fifteen or twenty years.

Q. How long have you been working for this company?

A. All that I have ever done has been for the C. & O. people.

Q. How long have you been working on that section up there?

A. I reckon this September will be three years. I worked there about six years in the beginning of my railroading.

Q. Were you one of Tom Littleton's crew of section men at the time of this accident?

A. Yes, sir.

Q. Were you there at the place of accident that day?

A. Yes, sir.

Q. How recently before that had your crew repaired the track at that point?

A. I could not say; it might have been quite a while and it might not have been long.

Q. Did you notice the rails at the point where that engine left the track the day it went off?

A. Yes, sir.

Q. What was the condition of the rails?

A. The rail where the engine went off was worn.

Q. Had you noticed it before?

A. Yes, sir.

Q. Had it changed any?

A. No, sir, I don't know as it had.

Q. Hadn't gotten any better?

A. No, sir.

Q. What was the condition of the rails at that point where the engine left the track?

A. Considerably worn. The ball of the rail had worn in the top of the flange. I could not say just how much for I never measured it, it was none of my business you know to see how much it was worn but it was considerably worn.

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Q. Was it worn to the web or not?

A. No, sir, not that much. Now a worn rail will wear more on the top of the ball than it will down here. (Indicating.)

Q. Mr. Littleton is a worn rail such as you have described a safe rail to have on a curve such as — one was?

(The foregoing question objected to, which objection the Court sustained.)

Q. Do you know from your experience, fifteen or twenty years' experience as a section man, repairing and building railroad tracks, as to what is a proper and safe rail to have on a curve such as that curve was?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, I think so, I think I could give a pretty good judgment of what would be safe.

Q. I will get you to state, if you know, what kind of a rail would be suitable for good railroading for that kind of a curve at that point?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, it should be a safe ball rail.

Q. Do you know how long those rails have been on that track in that curve?

A. No, sir, I don't know.

Q. Do you know about the construction of railroad engines as to being ball drivers, rigid trucks or anything of that kind?

A. No, sir, I do not, I don't know but very little about engines, know one when I see it and that is all.

Q. How long had that rail at that point been worn as much as you have stated to the jury it was worn before the accident?

A. I could not say, because the rails on these stiff curves wear pretty fast; possibly it had not been worn so bad as that very long. Some of them shave off pretty quick while it took some time to wear this much off.

94 Q. Did Tom Littleton know the condition of the rail?

A. Yes, sir.

Q. Who was your superintendent or who was above Tom in that work?

A. L. F. Frazer.

Q. Where does he live?

A. I believe his home is in Mt. Sterling.

Q. How recently had he been out there before the accident to examine the track?

A. Well, Mr. Frazer passed over the track every two or three days if he has the chance. He has so much to see after that some times the time will lapse over for him to be there; I could not say how long before that time he was there.

Q. Do you know whether or not he had been there to see about its condition?

A. I could not say.

Q. Were there any rotten ties in that curve in that point on the railroad?

A. If there were at that time they were very scarce.

Q. Do you remember to have noticed whether there were or not?

A. No, sir, I don't only when we were fixing the track and replacing the ties I noticed we didn't have very new ties to put in.

Q. Had you noticed anything about the spikes?

A. No, sir.

(Cross-examined:)

Q. Mr. Littleton you have said in your opinion that a safe rail would have a safe ball?

A. Yes, sir.

Q. That means a ball on both sides?

A. Yes, sir.

Q. Not worn at all?

95 A. Yes, sir, that is my best judgment.

Q. Then every train that went over it would wear it off more, would it not?

A. I suppose so.

Q. Then after the first train went over it you never would have a safe ball?

A. Well, no, I expect not.

Q. Then your idea is every time a train passed over it you should put in a new rail.

A. No, sir?

Q. You said it would have to have a safe ball?

A. Well I said a safe rail on a stiff curve.

Q. Then it would have to have a new rail after every train passed over it?

A. Well, I suppose every train would take a small slice.

Q. How long would a rail have a safe ball?

A. I don't know, possibly some time and possibly not so long. It would be owing to the train. I don't know how much each train would slice off at the time.

Q. How long would it be safe in your opinion to let a rail stay in on that curve with the amount of travel that goes over it?

A. I could not state that, because I don't know how fast these rails wear?

Q. Are there any other curves on that section?

A. Yes, sir, plenty of them.

Q. The same kind?

A. Yes, sir, same degree curves. This is about as stiff a curve as there is on the section, possibly a little stiffer.

Q. The only thing that you know about what is required of a rail is what you have seen on a railroad since you have been rail-roading?

A. Yes, sir.

Q. You don't know anything about the strength of steel or its wearing qualities?

96 A. No, sir.

Q. Nor how much it would have to be worn to give way to pressure on a curve like that with a train running over it?

A. No, sir.

Q. In wearing a rail on the upper side of a curve when it first begins there is only a part of the flange to the wheel that touches the rail, isn't there?

A. Yes, sir.

Q. And the flange is at an angle?

A. Yes, sir.

Q. Then it is protected that much more by having that much more power on the rail?

A. I think not, sir. I think the full power of the flange against the rail would have more tendency to wear the rail and more tendency to climb the rail.

Q. You have never had any experience in operating a railroad engine?

A. None at all, that is my judgment.

Q. Without any experience, that is your opinion?

A. Yes, sir, just my opinion.

Q. Do you know what kind of wood was in the ties there at that curve where this accident occurred?

A. No, sir, I do not. Do you mean oak or locust?

Q. Yes?

A. We don't use anything only white oak or locust.

Q. I asked you if you know what was in this curve?

A. Well, it was either white oak or possibly chestnut ties.

Q. I asked you if you knew?

A. No, sir, I don't.

Q. When you got there on that day where was the engine?

A. Laying over the bank.

Q. Had Mr. Kelly's body been taken out of the engine?

A. No, sir, I helped take it out.

Q. How many cars composed that train?

97 A. I could not tell you, my best judgment is there were three.

Q. Had they all left the track?

A. No, sir, I don't think they had, I think there was one car on the track, possibly two.

Q. Now the only part of the rail that was torn up was the upper side?

A. Both sides were moved, the ties were torn up; I expect it was seven or eight feet wide in there where it was torn up.

Q. Wasn't it just the upper rail?

A. No, sir.

Q. How far was that from where the engine climbed the rail?

A. Well, sir, it was three hundred or more feet over to where the engine went over the bank and the ties were piled up.

Q. Right up where the engine was?

A. Yes, sir.

Q. How far was the rear end of the rear coach from where the engine climbed the track?

A. I don't know, could not give much idea. I don't know the length of them passenger cars, I never measured nothing.

The next witness introduced on behalf of the plaintiff was JOHN SALSBERY, who first being duly sworn, testified as follows:

Q. Your name is John Salsbery?

A. Yes, sir.

Q. Where do you live?

A. Near Aden in Carter County.

Q. What is your business?

A. Well, I am a farmer and in the lumber business, and in the mining business.

Q. Do you run these fire brick mines?

A. Yes, sir.

98 Q. Are you acquainted with the track of the Chesapeake & Ohio Railway Company near Aden where Mr. Kelly, the engineer, was killed in June, 1911?

A. Yes, sir.

Q. How near do you live to that point?

A. Well, it is less than half and little over a quarter of a mile.

Q. How near is your house to the railroad track?

A. Seventy-five or eighty feet.

Q. Did you have occasion prior to that time to walk that railroad track at the point where this derailment occurred?

A. Yes, sir.

Q. Frequently or not?

A. Yes, sir, frequently.

Q. How long had you been living there?

A. Going on four years.

Q. In passing over that track did you notice the condition of the track at that point as to the rails and ties?

A. Yes, sir, several times there.

Q. What was the condition of the rails, first I will say, as to being worn?

A. Well probably as much as a couple of months or may be a little over before Mr. Kelly was killed my attention was called going up from this point when the section men were working on the track some rail on the low side was worn and the high side of the rail was considerably worn.

Q. What were the men doing?

A. They were taking some of the rails out and changing them over and putting in some new ties.

Q. What do you mean by changing them over?

A. They changed the worn rail from the high side on to the other side and put the rail on the high side on the other side.

Q. How much were these rails worn?

A. I could not say, considerably.

99 Q. Do you know what the web of the rail is?

A. No, sir, I do not.

Q. Do you know the upright piece that holds the ball that the wheel runs on?

A. Yes, sir.

Q. How much of that was worn?

A. I could not say how much was worn, I didn't measure it.

Q. Did you notice any shivers of steel cut from those rails?

A. You could see considerable iron that had come off the rail all lengths, I have seen it there a foot or two long.

Q. How was the rail on the lower side as to being worn?

A. The rail on the low side didn't look to be worn so much.

Q. I believe you said you noticed them taking out ties at that point?

A. Yes, sir.

Q. Did you notice whether they took out all the bad ties or not?

A. I could not say about that. The time I mentioned about going up there and talking to the section foreman he was putting the ties back and I asked him——

By Mr. Shelby: We object.

By the Court: I sustain the objection.

Q. I will ask you this, what kind of ties were they putting back in the track?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court, defendant excepts.)

A. Do you mean the condition of the ties they were putting back?

Q. Yes.

A. They looked rotten to me.

100 Q. Did you see them putting them back?

A. Yes, sir, and asked him——

By Mr. Shelby: We object to what he asked him.

By the Court: I sustain the objection.

Q. How many of these ties did they put back?

A. I could not say the number, there were considerable ties torn up though.

Q. What was the condition of the ties at that point as to being worn or broken where the rail rested on the ties?

A. The ties were considerably worn and doty.

Q. Were you down there at the place of the accident on that day?

A. Yes, sir.

Q. Did you see the track then?

A. Yes, sir.

Q. What was the condition of the ties where the train left the track that day?

A. Right where the train left the track the ties were not so much torn up.

Q. I am not asking about that.

A. Well the ties looked very doty.

Q. Did you notice whether or not any of the spikes were missing?

A. I could not say that I noticed that any of the spikes were missing at that point.

(Cross-examined:)

Q. You say they were changing the rails from the lower side to the upper side?

A. Yes, sir.

Q. And that was in April or May before the accident?

A. I think it was, I am not positive.

Q. Then in changing that rail from the lower side to the upper side that would bring the balls on the upper side that hadn't been worn?

101 A. Yes, sir, it would bring the outside of the lower rail on the inside.

Q. That is what I am asking you.

Q. Yes, sir.

Q. At the place where Kelly was killed where did that curve begin, how far from where the engine climbed the rail?

A. I reckon about eight rails, I am not positive.

Q. Could you see where this engine climbed the rail on which Mr. Kelly was killed?

A. Yes, sir. I don't know that that was the spot but they all said it was.

Q. You could see the mark on the rail could you not?

A. Well I don't know as I could. It showed that the ties had been knocked a little out of place, but didn't amount to anything,

didn't cut the ties up very bad, some of them looked worse than others.

Q. No ties broken up along there?

A. No, sir, it was seventy-five feet or maybe a hundred before it commenced to tear up the ties very much from where it jumped off.

Q. How long was it after the accident before you got there?

A. I don't know, I didn't go right down to where the engine lay, my health wasn't in good condition and I didn't go up in the crowd. It could not have been over thirty minutes, probably not that long. I heard the train when it went off, I heard the whistle making a noise and I got there just as soon as I could walk.

(Redirect examination:)

Q. On the day that this train went off what was the condition of that rail where the train left the track as to being worn?

A. Well I couldn't say, I don't remember of ever noticing particularly about that.

Q. I will show you this (Exhibiting piece of rail heretofore testified about to the witness) and ask you to state to the Jury
102 whether it was worn that much or more or less?

A. I could not say.

Q. How far had the engine gone into the curve before it left the track?

A. A short distance, it went off right at the mile post.

The next witness introduced on behalf of the plaintiff was H. M. WARE, who first being duly sworn testified as follows:

(Direct examination by E. C. O'Rear, of counsel for plaintiff:)

Q. Your name is H. M. Ware?

A. Yes, sir.

Q. What is your business?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. Twenty-three years.

Q. What railroad are you working on?

A. On the Chesapeake & Ohio.

Q. How long have you been working for that railroad?

A. The entire time.

Q. On what division of that road are you now working?

A. I am working between Ashland and Louisville.

Q. What trains do you pull?

A. Extra passenger trains.

Q. Are you acquainted with locomotive 143 of the Chesapeake & Ohio Railway Company's?

A. Yes, sir.

Q. When did you first know that locomotive?

A. She came down here in 1892, I think.

Q. Was 143 her number then?

A. No, sir.

Q. What was her number then?

A. 373.

Q. I will get you to tell the jury what kind of a locomotive that was?

103 A. It is a locomotive with three drivers on a side connecting its driving wheels and a four wheel truck.

Q. What was the weight of the locomotive?

A. One hundred and thirty-three thousand pounds.

Q. Did you ever run that locomotive yourself?

A. Yes, sir.

Q. How long did you run it?

A. I never run her regular but suppose I have run her two or three months or more, altogether.

Q. You have stated to the Jury that she had three drivers on a side. Did all these drivers have flanges on them?

A. No, sir.

Q. Which of them did not have?

A. The front driver.

Q. What is that kind of a driver called?

A. Ball driver.

Q. How about the trucks of that locomotive under the front of it?

A. It was a center bearing truck. A four-wheel center bearing truck.

Q. How was it built?

A. It was built up of iron bars with a big center casting extending across the middle of it.

Q. How many locomotives of that type did the Chesapeake & Ohio have in 1911 on this division?

A. Only the one I guess.

Q. Is that the only one you know of?

A. That was the only one here at that time.

Q. How many had they had of that type?

A. Those three.

Q. Do you know what had become of the other two?

A. No, sir.

Q. You will see in front of you on the floor there what appears to be a model of a locomotive truck. I will ask you to examine it and state whether or not that is a model of a locomotive truck?

A. Yes, sir.

Q. I will ask you whether or not that is a fair representation of model of the truck that was under engine 143?

A. I think that is a very good model of it.

Q. Are there some points of difference between this model and that truck?

A. This is equipped with a brake and that wasn't.

Q. This seems to have an air brake equipment on it?

A. Yes, sir.

Q. Do you discover any other difference between this model and the truck that was under that locomotive?

A. They are very much alike I think. These shoulders here were not on that truck.

Q. Is there any other name you give that truck except a center bearing truck?

A. I don't know whether there was any other name for it or not.

Q. Are there any more style of trucks used on the Chesapeake & Ohio road for these locomotives than this one?

A. Yes, sir.

Q. What are those styles?

A. There is one style that has a smaller casting.

Q. I will get you to explain that style you have just mentioned to the Jury?

A. Well, it is sort of frame work built with bars across it.

Q. Take this pencil and point it out to the Jury so they will understand it?

A. (Witness explains the style of truck just mentioned to the Jury by pointing out same from the truck on the floor in front of the Jury.) This casting is bolted to these bars and there are bars across the ends of it too.

Q. In your experience as a locomotive engineer and from having studied the subject, tell the jury which is the more rigid of the two styles of trucks you have just described?

A. This one in my judgment.

Q. You mean the one in front of the Jury?

A. Yes, sir.

Q. Is there any point of advantage in your judgment and opinion of the other one over this one?

A. Yes, sir.

Q. Explain to the Jury why?

A. Well that casting across there bolted down to the frame makes it so rigid that it can't give any, there is no pliability to it.

Q. Why is it more desirable to have more pliability in the frame of the truck?

A. I didn't say it was.

Q. Is it or not desirable to have more pliability in the truck?

A. Yes, sir.

Q. Why?

A. It will give the engine a better chance to come up to the rails and have better play.

Q. What is the truck under a locomotive for anyhow?

A. To help guide the engine.

Q. On a straight track is a truck needed to guide the engine?

A. Yes, sir, I think it is the way all engines are made.

Q. Now is it more or less useful on a curve to guide the engine?

A. I suppose a truck helps to guide it on a curve.

Q. Explain to the Jury the pliability of the truck and why it helps to guide the engine around a curve?

A. You see it rests on the center there (indicating on the truck in front of the Jury) and that gives it power to turn either way and follow the curve you know, and if it follows the curve around of course it helps to pull the engine around, and if it will give a

106 swing to the engine it gives the engine a better chance to go against the rail and catch the weight itself.

Q. Mr. Ware what is the tendency of a train when in motion, started on a straight track, as to whether or not it will go straight?

(The foregoing question objected, to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Any body will go in a straight line unless it meets resistance.

Q. Now when your locomotive reaches the curve what makes it conform to the curve?

A. It is the elevation of the curve and the flange on the wheel.

Q. Which side of the track do the flanges press against?

A. The outside.

Q. Do you mean the upper side?

A. Yes, sir.

Q. Is there another type of truck besides the two you have mentioned?

A. Yes, sir.

Q. What is that?

A. The swing center.

Q. Describe that to the Jury, if you please?

A. It is constructed with a center casting like this with bars across and it sets in there so this center cannot go back and forth this way.

Q. How does that effect the movement of the locomotive in going around a curve?

A. If you guide the truck against the rail that lets the engine follow the curve and the truck goes under and gives the driving wheel a chance to come up and get some of the weight.

Q. With a truck as this one is under engine 143, I will ask you whether on a sharp curve it is more difficult or less difficult for the engine to take the curve than if it had either of the other
107 style of truck that you have mentioned?

A. I think this truck is forced harder against the curve and has to bear the shock of the engine on account of not having that swinging center or not having pliability enough to follow around the curve.

Q. Now if a rail should be so worn in a curve, I will ask you whether a rigid truck such as this one is, is more apt or less apt to ride such a worn rail?

A. It is more apt.

Q. I will ask you whether or not it is true the more the rail is worn and the more rigid the truck is the more apt the train is to ride the track?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, the more the wheel is worn and the more rigid the truck is the more danger there is.

Q. I believe you said you had driven this engine 143 yourself?

A. Yes, sir.

Q. Before this accident to Kelly?

A. Yes, sir.

Q. Did you a short time before that while driving that engine have it to leave the track with you at Leon Tunnel?

(The foregoing question objected to, which objection the Court sustained.)

Q. Mr. Ware at Leon Tunnel last year before the accident to Kelly did you have occasion to examine the track after you had gone into the curve going into that tunnel?

A. Yes, sir.

Q. How was the condition of that track as to being worn compared with the condition of the track at this Aden place?

(The foregoing question objected to, which objection the Court sustained.)

Q. I will ask you to compare this section of rail I am
108 handing you to the rails that were worn at Leon Tunnel?

A. I don't think it was worn that bad.

Q. Were you in the tunnel or out of the tunnel when the train left the track that time?

A. I was outside of the tunnel.

Q. Now I will ask you whether or not your engine left the track at that place?

(The foregoing question objected to, which objection the Court sustained.)

Q. Did you see that engine any time shortly before Kelly was killed?

A. I don't remember.

Q. Did you see her after she came from the shops after the Leon Tunnel accident?

A. Yes, sir.

Q. Did she have the same kind of truck?

A. Yes, sir.

Q. What kind of drivers did she have?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Two flange drivers and one ball driver.

Q. Now did that engine leave the track there at Leon Tunnel?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant *defendant* excepts.)

A. Yes, sir.

Q. What kind of a train were you pulling?

A. A passenger.

Q. This local train?

A. Yes, sir.

Q. At what speed were you running?

A. Thirty miles an hour.

A. What was your schedule?

A. I don't remember.

109 Q. Did you examine the track and the engine after that wreck there at that tunnel?

A. Yes, sir.

W. Did you report that accident?

A. I made out a form.

Q. To whom was that report sent?

A. To Mr. Hobson.

Q. At Lexington?

A. Yes, sir.

Q. Do you know his initials?

A. W. P. Hobson.

Q. Where is he?

A. He was here yesterday.

A. What is his office?

A. He was Master Mechanic in Lexington.

Q. Did you report to him the cause of that derailment?

A. I reported to him what in my judgment was the cause.

Q. What did you report to him was the cause of it?

(The foregoing question objected to, which objection the Court sustained.)

Q. What in your judgment was the cause of that derailment?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, I think it was a combination of circumstances—the rail was worn some, it had this rigid truck and the ball driver. I think the combination of the three was the cause of the derailment.

Q. Mr. Ware did you have any conversation with your superior, Mr. Hobson, or whatever your superior was, with respect to that report concerning that accident as to the condition of this engine 143 prior to the time Kelly was killed?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

110 A. I had some conversation with him after the report I had made.

Q. What was it?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Q. What was it, Mr. Ware? Did he say anything about changing the report?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Mr. Hobson didn't tell me to change the report or say how he wanted it changed, but he called me up in the office and said the report had been sent back to him; I don't remember what he did say now.

Q. Well, did he ask you to make any change in the report or make an additional report on it?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, he wanted an additional report.

Q. What did he want you to report additionally?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't think they liked my report and they wanted it changed.

Q. To what part of your report did they object?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I think it was that truck.

Q. You have mentioned here about this locomotive having a ball driver—is that an advantage or a disadvantage, in your opinion?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

111 A. It is a disadvantage.

Q. Is that opinion based upon your experience as a locomotive engineer?

A. Yes, sir.

Q. Were there any other locomotives, or are there now, in the service of the Chesapeake & Ohio Railway Company that have the ball drivers?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. There are none on this division at this time. I think this little 184 on this short line has a ball driver.

Q. You mean the one that runs on this coal-road?

A. Yes, sir.

Q. Do you know how many locomotives there are in the service of the Chesapeake & Ohio Railway Company on this division?

A. No, sir.

Q. Is this 143 the type of locomotive that is now being made and used on this division?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They are being used with the exception of this truck. I think engine 127 is very much of the same type.

Q. Has she a ball driver?

A. No, sir.

Q. Would this locomotive have been any safer in your opinion if it had a flange on that driver?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. In your opinion would it have been safer if it hadn't had a flange on that driver but had one of these swinging center trucks under it?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

112 A. I don't know with the ball driver whether it would have been safer with the swinging center truck or not.

Q. Do you know whether the defendant Railroad Company before this accident had put flanges on its drivers or not?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I do not know.

Q. Do you know where engine 143 is now?

A. No, sir.

Q. Is she on this division?

A. No, sir.

Q. Prior to the derailment of engine 143 in which Mr. Kelly lost his life did you request or recommend to your superiors in office to put a swing center truck under engine 143 for the purpose of making it more safe?

(The foregoing question objected to, which objection the Court overruled, to which objection defendant excepts.)

A. No, sir.

Q. Did you recommend putting another truck other than the one that was under it?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I can't answer that direct.

Q. Tell what you said?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I reported to the Master Mechanic on a form that I considered this rigid truck was the cause of the trouble at Leon. I left it there, didn't suggest that they do anything at that time with it.

Q. I will ask you that if upon your former examination these questions and answers were not asked and given? "Prior to
113 the derailment of the train in which Mr. Kelly lost his life did you request or recommend to your superior officers to put a swing center truck under engine 143 for the purpose of making it more safe?" (Objected to, overruled, exception.) "No, sir, I didn't recommend that truck". "What did you recommend"? "I told them that I thought this truck was not safe and asked them to put one under there that was more pliable, as I expressed it, not so rigid?"

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. That was my answer then.

Q. Is that true or not?

A. No, sir, I got a little mixed.

Q. Explain how that was?

A. I made a request afterwards that they change this truck and got that mixed with this time.

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Cross-examined by Mr. Shelby, of counsel for defendant:

Q. Don't you know engine 143 is over on the main line?

A. I don't know where she is.

Q. You mean you haven't seen where she is?

A. I don't know, nor I haven't seen her either.

Q. You have been asked by Judge O'Rear as to the construction of three kinds of trucks. Commencing with this truck, then the arch bar truck, then the truck with the swing center plate. Now what do you call this type of truck on the floor?

A. I call that a center bearing truck.

Q. Well what do you call the arch bar truck, a center bearing truck too?

A. Yes, sir.

Q. How would you call this truck to distinguish it from the one constructed by the arch bars?

114 A. I don't know what the Master Mechanic's terms are.

Q. Just the name of that sort of truck as distinguished from the cross-bar and distinguished from the swing center plate, what would you call that?

A. I call that a more rigid truck.

Q. Is that the name of it?

A. I don't know whether they distinguish it any way except the center bearing truck or not.

Q. Well now the arch bar truck is a center bearing truck?

A. Yes, sir.

Q. What do you mean by a center bearing truck?

A. The weight is thrown on the center. All three of them are center bearing trucks.

Q. Now the only difference, as I understand you, between the different types of trucks, the different types of construction of this sort of truck and the arch bar that instead of having the solid plate as shown in this you have the center plate resting upon what is called arch bars?

A. Yes, sir.

Q. And they are about how wide?

A. Three inches.

Q. And how thick?

A. An inch and a fourth.

Q. Aren't they two and a half inches thick?

A. No, sir.

Q. And five inches wide?

A. No, sir, they are three inches wide.

Q. Isn't it a fact they are five inches wide?

A. I don't think so.

Q. Aren't they five inches wide and two and a half inches in thickness?

115 A. May be for a large engine.

Q. Did you ever measure them?

A. I don't think I did under that engine.

Q. Did you ever measure them under any engine?

A. Yes, sir.

Q. What sort?

A. Under a ten-wheel engine, that was a small engine.

Q. Well, now, an iron bar three inches wide and an inch and a quarter thick has a great deal of rigidity about it, hasn't it?

A. It depends on the weight and force that is applied to it.

Q. Well, is it rigid or not?

A. It would be rigid with a certain weight but with a heavy weight it would not be.

Q. Aren't they made of steel?

A. I don't know.

Q. Don't know the material they are constructed of and yet you express an opinion as to the amount of flexibility there is in them?

A. Not exactly the amount, I don't know exactly the amount.

Q. You could not know that without knowing the material of which they are composed, could you?

(The foregoing question objected to, which objection the Court overruled.)

A. The wrought iron and steel are both flexible.

Q. Which is the more so?

A. The wrought iron is easier to bend but the steel will give more.

Q. How many of these arch bars are there in that type of truck known as the arch bar truck?

A. Four.

Q. Where are they located in reference to the center plate?

A. They are under the center plate, two on each side.

Q. Now is there anything running the lengthway of the truck in that construction?

116 A. Yes, sir, bars across here too. (Indicating.)

Q. How many?

A. Two.

Q. So that under the center plate in an arch bar truck you have six bars three inches wide, as you say, and an inch and a quarter thick?

A. Yes, sir.

Q. Now upon these bars rests this square which I will indicate here with a pencil known as the center plate, isn't it?

A. Yes, sir.

Q. And in the center of that square there is a circular casting?

A. Yes, sir.

Q. And that is known as the female casting?

A. Yes, sir.

Q. And in that fits from above what is known as the male cask-ing fastened on to the boiler of the locomotive?

A. Yes, sir.

Q. Isn't it a fact that those two caskings fit into each other and that one of them will turn inside of the other?

A. It will.

Q. And isn't it a fact fitted as they are in that way there is a lateral play of one-fourth of an inch?

A. Yes, sir.

Q. And that is the fact whether you have the truck of the construction shown in this model or the arch bar truck or the swing center truck?

A. It is.

Q. So that in each of these kind of trucks, all of which are center bearing trucks, there is a lateral play of about one-fourth of an inch in the fitting of the male casking into the female casking?

A. Yes, sir.

117 Q. What makes you think that there is less rigidity in the arch bar of type construction than in this where the whole plate is solid?

A. Well, it is for the reason of this big casting. It extends all the way across here and this casting is slotted under there and this here (indicating), is fitted into it and bolted down tight, and you can't move it at all.

Q. Can you move either of the arch bars at all?

A. Yes, sir, it is not so solid as that.

Q. How are they moved, they are not laid in loose?

A. No, sir, they are bolted down.

Q. The object is to get them as tight as possible?

A. Yes, sir.

Q. The object is, of course, to get them so tight that they will not move.

A. Yes, sir.

Q. Describe to the Jury, if you please, the construction of the springs that are placed under these center plates?

A. All are placed like they are here. (Indicating by the one on the floor.) You see these two bars extend down here (indicating) and come to here (indicating). They rest on these boxes that bear on the wheels and the springs rest on these bars.

Q. How many springs are there?

A. Two.

Q. And then through the spring what is the motion communicated to?

A. This rests on the spring (indicating), and the spring rests on that (indicating).

Q. So that there are several distinct provisions by which the motion of the engine is communicated through the center plate before it finally rests on the axle?

A. Yes, sir.

118 Q. You don't mean to say that the arch bar construction is desirable in order to have the locomotive spring up and down and make it easier riding, do you?

A. No, sir.

Q. Then your idea is that the arch bar construction, although those arches are made of iron three inches wide and an inch and a quarter thick, that the desirability of that one over this one lies in the fact that you get some other kind of a motion. What is that motion?

A. It is the side motion.

Q. And you get that side motion although the steel bars are riveted in there in such a way as to keep them if possible, from moving?

A. The bolts break and work loose.

Q. Then they only reach their true excellency when the bolts in there break?

A. No, sir.

Q. Now isn't it a mechanical fact that the object and the only advantage of the arch bar construction to rest the center plate on is that in the event of a breakage you can get a bar of steel and go to a blacksmith's shop and hammer it and replace it, whereas if this solid casting breaks it will disable your engine for weeks and you will have to send it to the factory for repairs?

A. No, sir, I don't think so.

Q. Well, that is a fact, isn't it, and less expensive too?

A. Yes, sir, but you can't have it done out on the road.

Q. No, but you can at the shop terminals.

A. Yes, sir.

Q. Now, isn't it a fact that these bolts that you say are sometimes broken are broken by the strain that is put upon the engine and not by any normal spring that is expecting to take place in the engine?

119 A. Yes, sir.

Q. Now Judge O'Rear asked you if it would not have been safer if you had the swinging center plate to have used the ball driver, and you said no. Don't you know you cannot use the ball driver with the swinging center plate?

A. No, sir, I do not.

Q. Don't you know in the operation of an engine it would be suicidal to attempt to run an engine with a swing center plate and the ball driver in front?

A. I wouldn't recommend it.

Q. Why?

A. Could not hold the two on the rail.

Q. It has been a very good type of engine construction to use a ball driver either this type or the arch bar type, hasn't it?

A. It has with the arch bar type?

Q. Why did they use that?

A. It has a more rigid wheel base.

Q. It does make a more rigid wheel base?

A. Yes, sir.

Q. And isn't it a fact that the front driver and ball drivers, provided you have a center plate of the proper construction, go around a curve easier and with less strain than if they had flanges on them?

A. There would be more wear on the truck because——

Q. I am talking about the rail?

A. Yes, sir.

Q. Isn't it a fact that the ball driving wheel is wider than the flange wheel?

A. Yes, sir, I guess so, they look wider, but when you trim the flange off I think they are about the same.

Q. Isn't there more surface in the ball driver than the 120 flange driver?

A. Yes, sir.

Q. They are wider by the width of the flange?

A. Yes, sir.

Q. Well, now, isn't it a fact that the less rigid your wheel base is the more easily the engine will take the curve?

A. Yes, sir.

Q. Mr. Ware, isn't it a fact that it is, whether the correct opinion or not, but very widely that opinion among good mechanical engineers and on well managed roads, that the ball driver with the rigid truck is a better type of truck than the one with the swinging center or the arch bar truck?

A. I don't know the opinion of other roads.

Q. Do you know the general opinion of mechanical engineers?

A. No, sir.

Q. Then what you are undertaking to give is not the general opinion among mechanical engineers but your own thought about the matter?

A. Yes, sir.

Q. Have you ever looked into the facts as to other roads in that respect?

A. No, sir.

Q. When did engine 143 come on this division?

A. In 1892.

Q. What was her number at that time?

A. 373.

Q. How many engines of her type came on this division at that time?

A. Three. 371-372-373.

Q. And they afterwards became what numbers?

A. 141-142-143.

Q. Do you know where 141 is at this time?

A. No, sir.

Q. Do you know how long it has been since she was on this division?

121 A. No, sir.

Q. Did you ever run 142?

A. I don't remember.

Q. Did you ever run 141 yourself?

A. No, sir.

Q. Did you ever run 143?

A. Yes, sir.

Q. And you had some trouble with 143 at Leon Tunnel?

A. Yes, sir.

Q. For how long a time did you run engine 143?

A. I never run the engine regular.

Q. Isn't it a fact that what is known as the swinging center plate about which you have been talking came into use and was adopted as a result of the building of the larger and heavier engines?

A. I don't know when it came into use but I think it came into use once and went out and come back again.

Q. It is a fact, is it not, that the weight of engines in the last ten years has increased very largely?

A. Yes, sir, I guess so.

Q. For instance, what did 143 weigh?

A. 133,000 pounds.

Q. And what do the larger type of engines now weigh that pull the big cars or large passengers trains?

A. About 200,000 pounds.

Q. They weigh considerably more?

A. Yes, sir.

Q. Hasn't it only been since the introduction of that large type of engine that the swinging center plate has come at all into general use?

A. Several years ago they used that swinging center plate.

Q. Yes, several years ago the large type of engines came into use.

122 Q. Take the G. 4. class of engine, does that belong to the large type of engines you have been talking about?

A. No, sir, that is a smaller engine.

Q. What do you call these big ones?

A. I don't know.

Q. Well, the G. 4 is very much larger than 143?

A. I don't know the engines by these designations except some of them—the G. 1 and the G 7—I don't know what the G 4 type is.

Q. What do you call this one? (indicating.)

A. I don't know what her letter is.

Q. Is't it a fact that with the larger type of engines that have come into use and the adoption of the swinging center plate that coincidentally with those two things they began the disuse of the ball driver and that the ball driver went out of use because its use is not compatible with the swinging center plate which is put under the larger type of engines?

A. No, sir, I don't think that is the reason.

Q. What I mean is, that coincidentally with the adoption of the larger type of engines that the ball driver passed out of use because it could not be used with it?

A. You could not use the ball driver on these types.

Q. Did the ball driver go out of use before these types come in?

A. I think it has been several years. It has been found by ex-

perience better to have one type of wheel. I think they found the engine was safer with the flange tire on it.

Q. That is your idea? Well, now the question I want to know is this—These large types of engines came into use a comparatively few years ago, did they not?

A. Yes, sir.

Q. And when they came into use there also came into use the swinging center plate? I mean general use?

A. As far as I know it has just been in recent years.

123 Q. Now isn't it a fact the ball driver went out of use when they began to use this swing center plate under the large engines?

A. I don't think the large engines ever had the ball drivers.

Q. Because they had the swing center plate, didn't they?

A. Yes, sir, but I think the reason the ball drivers were not used on large engines—

Q. I didn't ask you for the reason, just for the time?

A. I don't know Mr. Shelby. We don't get things down here until they are several years old.

Q. You keep pretty well posted, don't you?

A. On some things.

Q. You have been examined as an expert here?

A. No, sir.

Q. I thought your opinion had been asked about various matters?

A. I haven't set up myself as an expert at all.

Q. I believe you stated that you didn't know where engine 143 was now?

A. No, sir, I don't know.

Q. Did you ever run on the division between Lexington and Louisville?

A. Yes, sir.

Q. How are the curves on that division, especially between Lexington and Frankfort?

A. There are curves nearly all the way down there.

Q. What are some of the highest degree curves?

A. I don't know.

Q. Isn't it a fact that there are curves on that part of the railroad between Lexington and Frankfort that are stiffer curves than the one there at Aden where this wreck occurred or the one at Leon Tunnel where your engine went off?

A. I don't know; I don't think so.

Q. Do you remember that curve just as you go into Frankfort from Lexington?

124 A. There is a curve there that we run slow around.

Q. Are there not many curves between Lexington and Louisville, or Lexington and Frankfort rather, that are sharper than the one at Aden or at the Leon Tunnel?

A. It seems to me they are the sharpest down here.

Q. Don't you know there are 12 degree curves on the road between Lexington and Frankfort?

A. I don't know what the degree is.

Q. The one at Leon is six and the one at Aden is eight. Don't you know that to be a fact?

A. I don't know the degrees.

Q. You never had any trouble with 143 getting derailed on any of these curves?

A. No, sir.

Q. And you run her with a ball driver and a rigid truck?

A. Yes, sir.

Q. You were running these express trains?

A. Yes, sir.

(Re-examined:)

Q. But you were running over the L. & N. tracks were you not?

A. Yes, sir.

(Recr.-ex.:)

Q. About what time was it that you first acquainted Judge O'Rear or Judge Williams with your theory of ball drivers and rigid center plates, and so on?

A. Sometime before the first trial.

Q. About how long?

A. Two or three weeks.

Q. Where were you at the time you did that and who was present at that time?

A. Mr. Williams came up and we talked about it.

Q. Came up where?

A. Lexington in the round house.

125 Q. That was the first time that you had ever discussed the matter with him or anybody else?

A. I had talked it over with others. We engineers discussed it among ourselves.

Q. What time was it that Judge Williams got on to the fact of your theory of railroad construction &c.?

A. I don't know, you will have to ask him.

Q. Is there no way I can get at it without asking him? He may have gotten it from somebody else. You say you engineers discussed it among yourselves. What engineers have been discussing it?

A. A good many of them.

Q. Tell who they were?

A. Mr. Gorrell and Mr. Summitt of Ashland.

Q. There had been no regular meeting or anything of that sort?

A. It had been discussed but no action taken on it.

Q. In this report you say you made to Mr. Hobson after the Leon derailment, you say that you and Mr. Hobson had some discussion as to the correctness of your theory about trucks or center plates?

A. I don't remember what the discussion was. It seems they were not satisfied with my report.

Q. You had expressed certain opinion as to the truck construction

in your report and you and Mr. Hobson had some arguments about it? It was entirely in a friendly way?

A. Yes, sir.

Q. And he thought your opinions were wrong?

A. He must have.

Q. And he wanted to convince you that he was right about it? Isn't that a fact?

A. No, sir.

126 Q. He didn't try to get you to make any false report, did he?

A. Certainly not.

Q. Now is it or not a fact that upon the former trial of this case these questions were asked and answered relative to the size and material of arch bars—"How wide are they, how long and how thick and of what material are they made? And your answer was, "I don't know those things."

A. Yes, sir.

Q. Then wasn't this question asked—"What did they have the appearance of being as to their size and material?" And your answer was, "They were four or five inches across and about two inches thick."

A. That was in reference to the side bars.

Q. Were you not examined on the arch bar question? Wasn't this question asked and answered? "Now these bars you speak about in the construction of that kind of a truck that you have explained to the Jury, what is the size of those bars?"

Q. And your answer was, "I don't know the distance across them." And then the question, "How wide are they, how long and how thick and of what material are they made?" And you answered that you didn't know. Then the question, "What did they have the appearance of being as to their size and material?" And you answered, "Four or five inches across and about two inches thick."

Q. Didn't you say on the former trial that while you didn't know they had the appearance of being four or five inches across and about two inches thick?

A. My impression is I meant the side bars.

127 (Re-re-examined:)

Q. Didn't you say this—"These bars that you have marked "T," give the size of them?" And you answered, "They are about four inches wide and possibly an inch and a half or two inches thick?"

A. That sounds like my statement in regard to this side bar and that is about right.

Q. Why don't they have these ball drivers on now, either large or small engines?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. We have done away with them because experience has proven they are not safe as the flange.

Q. Have they or not been putting them on the small engines as well as the large ones?

A. They have.

Q. Haven't they been doing away with the ball drivers on the small engines as well as the large ones?

A. Yes, sir.

Q. In going around these curves that they have been talking to you about on the Lexington & Louisville division of the L. & N., and especially that stiff curve, I will ask you if you didn't run under orders to reduce the speed to fifteen miles an hour on that curve?

A. Yes, sir.

Q. There was no such an order on the Aden curve?

A. No, sir, that was thirty-five miles an hour.

Q. Did you know the condition of the track on this L. & N. road from Louisville to Lexington?

A. No, sir, you can't tell very well without getting down and examining it.

Q. Can an engineer tell from his position in the cab whether the rails are worn or are not safe?

128 (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Q. He can tell to a certain extent but cannot be accurate about it.

Q. What can you tell about the condition of the ties from your cab when the engine is running at the rate of thirty-five miles an hour along the road?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. That is about the same way.

Q. Mr. Shelby inquired of you about a discussion that you locomotive engineers have had among yourselves with respect to this rigid truck, the advisability of using it or disusing it, I will ask you if there hasn't been such a discussion among the people and if they hadn't taken action upon it and asked the road to take action upon it?

(The foregoing question objected to, which objection the Court sustained.)

Q. Do you know how Judge Williams or how Mr. John William learned that you knew anything at all about engine 143 or its trucks or drivers or anything else?

A. No, sir.

Q. Didn't they come to you with the information that they themselves had about it, knowing that you had run the engine, and asked you to state the facts about it?

A. Yes, sir.

Q. Is there any rule of your Company which requires engineers in the service of the Company not to tell the truth about the condition of locomotives?

129 (The foregoing question objected to, which objection the Court sustained.)

Q. Is there any rule requiring you not to tell it at all?

A. I never heard of any.

Q. Is there any rule of the Company which prevents you from talking about any fact that you may know about your theory of building engines?

A. I never heard of any, I never was approached that way at all.

(Re-re-crossed:)

Q. Is there any rule of any kind which in your judgment would prevent a man from assisting in an attack upon his employer by either making suggestions or aiding in the formulation of theories or in the presentation of dogmas?

A. We are supposed to look out for the interest of the Company.

(Re-re-examined:)

Q. But you are also supposed to tell the truth?

A. There is no rule to prevent us from telling the truth.

Having heard the foregoing portion of the evidence and there not being time to conclude, the Jury is admonished by the Court and put in charge of the Sheriff, and Court is adjourned until the following morning at 9 o'clock.

On the following morning at 9 o'clock, pursuant to adjournment, court convened and the trial continued as follows:

By permission of the Court and counsel the witness, H. M. Ware, is recalled for further cross-Examination.

Q. Mr. Ware it is a fact, is it not, that you have taken a great deal of interest in the prosecution of this case?

A. It is.

Q. It is a fact that you have made and furnished suggestions to counsel on the other side?

A. Yes, sir.

(Re-re-examined:)

Q. Why did you do that, Mr. Ware?

130 A. For my own protection and the protection of my fellow-employees; and I didn't think the truck was all right.

Q. As engineer?

A. Yes, sir.

Q. Had you or not put the same proposition of security up to your company first?

A. I did, sir.

Q. And they refused to do anything with it—or didn't do anything with it?

A. They at last put the flange tire on engine 143.

Q. But they didn't do it until after Matt Kelly was killed?

A. No, sir.

Q. I believe you were asked yesterday how you came to reveal what you know about it. Mr. Ware the first suggestion was it not

that you ever made about this matter to any person representing Mr. Kelly's estate was when you were approached by those representing her with the statement that they were in possession of information that you had this correspondence?

A. Yes, sir.

Q. Up to that time had you ever said anything to any of them or volunteered any information to them about it?

A. No, sir.

Q. Mr. Ware you knew, did you not, that this man Matt Kelly, also had a brother running on an engine?

A. Yes, sir.

A. And that he had a brother-in-law, Mr. Armstrong, also running on an engine?

A. Yes, sir.

Q. And your suggestion both to the Company and to those representing Kelly's estate, as I understand, were caused by your interest in seeing the Company do what it could to protect other lives?

131 (The foregoing question objected to, which objection the Court sustained.)

Q. Did the placing of the flange on the front driver to which you have just referred have a tendency to render that engine less dangerous?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I think so, yes, sir.

(Re-re-crossed:)

Q. Mr. Ware you said that the first suggestion which you had made was after counsel for the plaintiff had approached you with certain information which they had received as to some correspondence which you had had, Is that a fact?

A. Yes, sir.

Q. Do you know from whom they had gotten that information?

A. No, sir.

Q. Had you talked to anybody yourself in regard to that before?

(The foregoing question objected to, which objection the Court overruled.)

A. Yes, sir.

Q. To whom?

A. To different people, especially the railroad engineers.

Q. Who are they, can you give their names?

A. Mr. Gorrell, Mr. Summitt—

Q. Anybody else?

A. Yes, but I don't know who they are now.

Q. No other name you can recall?

A. I have talked to a good many of them.

Q. Ever talk to Mr. John Kelly?

- A. I don't remember of talking to him about it.
132 Q. Ever talk to Mr. Armstrong about it?
A. I don't know whether I did or not.

Q. Now your conduct in giving your active aid to the prosecution in this case while continuing in the service of the company has been due entirely to the altruistic motive on your part of rendering a service to the Company and its employees, has it?

A. Yes, sir.

Q. And you say that has been done to secure the adoption of certain views you have which differ from the views of the Mechanical Department of the Railroad Company?

A. I didn't say that.

Q. Isn't that a fact?

A. I think they all agreed that the engine should have flanges.

Q. It is a fact that you did differ from the Mechanical Department in rendering views as to the construction of trucks?

A. Yes, sir.

Q. You thought one thing was better and they thought another thing was better?

A. No, sir, not exactly that; they thought this truck was all right and I didn't.

Q. Well, I say they thought it was all right and you didn't, and therefore in order to bring them around to your views you assist in the prosecution of a suit against them?

A. This truck is not the only thing.

Q. I say that is one of the things?

A. Yes, sir.

(Re-re-ex:)

Q. Counsel has asked you if you had talked to any other people other than those representing Mr. Kelly's estate and if so, to whom.

I will ask you if in addition to that you didn't have considerable correspondence with people representing the Railroad
133 about this truck and this ball driver before I ever saw you and before you had talked to either Armstrong or any person connected with this suit?

A. I had correspondence with some of the Company's representatives.

Q. And was that in reference to the ball driver and the rigid truck?

A. Yes, sir.

(Counsel for plaintiff moves the Court to direct the Clerk to produce the correspondence to which defendant objects, which objection the Court sustained, to which ruling of the Court plaintiff excepts.)

The next witness introduced on behalf of the plaintiff was SILAS COONS, who first being duly sworn testified as follows:

Q. Your name is Silas Coons?

A. Yes, sir.

Q. By whom are you at present employed?

A. By the Chesapeake & Ohio Railway Company.

Q. Where do you reside?

A. At Ashland.

Q. In what capacity are you employed?

A. Train Inspector.

Q. For what length of time have you been employed?

A. Thirty-six years.

Q. And you are now train inspector?

A. Yes, sir.

Q. Have you at any period during that employment been known as the wrecking boss?

A. Yes, sir.

Q. State what experience you have had?

A. From 1889 to 1907.

Q. What are the various capacities in which you have served the railroad?

134 A. Well, I worked in the shops from 1887 to 1889.

Q. In working in the shops what kind of work did you do?

A. Car building.

Q. Car construction?

A. Yes, sir.

Q. What do you know about locomotives?

A. Well, I know the pieces of iron.

Q. Did you ever aid in the construction of locomotives?

A. No, sir, but I have put pilots on and shoes on them and caps on, and such as that.

Q. How many years were you engaged as wrecking boss?

A. From 1889 — 1907.

Q. Do you know the various kinds of trucks that they have under their engines?

A. Yes, sir, three kinds.

Q. Tell the Jury about them slowly—let's take this one first. What kind of a truck is that called?

A. I call that a rigid truck.

Q. Then what other kinds are there?

A. Swing center truck and the arch bar truck.

Q. Which is now the accepted truck by people of experience and knowledge in railroad engine construction?

(The foregoing question objected to, which objection the Court sustained.)

Q. Which in your opinion Mr. Coons is better and safer?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. The swing center truck.

Q. Well, there are three, which is the second best?

A. The arch bar truck.

Q. Which is the third best?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

- 135 A. That rigid truck I consider the worst of the three.
Q. Why?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Because it is rigid and not flexible like the others that will give on a curve.

Q. Which of the three is most likely to cause a wreck or derailment when you are going around an eight degree curve?

(The foregoing question objected to, which objection the Court sustained.)

Q. If one of them is likely to derail a train going around an eight degree curve which one of them is it?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. The rigid truck is the worst one.

Q. Now what effect would you say a front ball driver would have on the probability of a derailment on an eight degree curve with that rigid truck?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. That rigid truck with the ball driver would be more apt to — a derailment than those others.

Q. Mr. Coons what can you say that is? (Exhibiting piece of rail to witness.)

A. That is a piece of steel rail.

Q. Why are the sides not like each other?

A. They are worn.

Q. What effect, if any, would a rail worn as that one is have upon an engine with a front ball driver and a rigid truck on an eight degree curve and going at the rate of thirty miles an hour?

- 136 (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I could hardly say at that speed. That rail I don't think is worn to danger.

Q. What tendency, if any, does a worn rail have upon the climbing of that rail by a rigid truck and ball driver?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. It would have some effect if worn a little more than this one. That rigid truck and ball driver would throw that truck against this (indicating) a great deal harder than a flange driver would.

Q. What causes a rail like that to be worn?

A. Going around the curves.

Q. What are the requirements of good railroading as to the quality of the rails on a curve and as to the quality of the ties?

(The foregoing question objected to, which objection the Court sustained.)

Q. What experience have you had in looking after wrecked tracks and things like that?

A. The most I do is seeing to getting the tracks down. Whenever a wreck happens our first duty is to clear the track and get it down.

Q. How long have you been in the wrecking business?

A. From 1889 to 1907.

Q. Can you say from your experience—You know what good railroading requires in the track, that is, the ties themselves and the rails on an eight degree curve?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, sound ties and good rails.

Q. Did you visit this wreck immediately after this accident occurred in which Mr. Kelly lost his life?

A. No, sir, I wasn't about it.

137 Q. Now I would like for you to explain to the Jury why it is that you say the rigid truck and the ball driver are not safe?

(The foregoing question objected to, which objection the Court sustained.)

Q. Why do you say that the rigid truck and ball driver are likely to cause a train around an eight degree curve at thirty miles an hour to climb the rail?

(The foregoing question objected to, which objection the Court sustained.)

Q. You have said that there are two other construction- of trucks better than this one? (Indicating.)

A. Yes, sir.

Q. Kindly illustrate to the Jury why this is objectionable, if it is?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Q. Tell how this truck operates?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Now this truck understand has a twenty inch center plate on this engine and this is rigid here (indicating) and in going round a curve the engine is sometimes thrown ten inches off the rail, letting it climb the rail. Also sometimes there is not enough weight on this truck and the ball driver following it jumps a little.

Q. Assuming that this track on which this accident occurred, that the rails were worn about like or more than the one that has been presented to you and that the train was running at from twenty-five to thirty miles an hour on a eight degree curve with a rigid truck and ball driver, what in your opinion caused the derailment?

138 (Counsel for defendant object to the foregoing question and particularly to the words, "or more," which objection the Court sustained as to the words, "or more.")

Q. Well leave out the words "or more," and worn as much as the one presented to you, with the ball driver and the rigid truck?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

By the Court: He may answer if he knows.

A. I wasn't at this wreck you know, but it should not have gotten off at that speed.

Q. What in your judgment caused it?

(The foregoing question objected to, which objection the Court sustained.)

Q. At what speed would that ball driver and rigid truck cause to get off the track?

(The foregoing question objected to, which objection the Court sustained.)

Q. What is the effect of the ball driver where you have the rigid truck?

By the Court: The Jury may not have heard what you said and I don't remember of you telling what the ball driver is?

A. It is a tire put on a driving wheel without a flange to it.

Q. On an eight degree curve where you have a front ball driver there a contact between the rail and the second driving wheel with rigid truck?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. The first driver on this engine you know was ball and the second one had a flange on it. Of course, there was no way to hold this driver on at all, there was no flange on it and the second driver and the pony truck kept the engine on the track.

Q. Tell the Jury whether or not that would be a greater strain on the rigid truck?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

139 A. Certainly.

Q. What would be the tendency of that greater strain on the rigid truck as to its climbing the rail?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. There is no give to that rigid truck at all and of course there would be more tendency to climb the rail; the weight would go to the bottom like everything else if it had the motion truck, it would swing and draw this ball driver on the rail.

Q. Did you know engine 143?

A. Yes, sir.

Q. When did she come here?

A. About the first of 1891, or '2.

Q. At that time was she a new or an old engine?

A. They were all three new ones.

Q. You say they came here about 1892?

A. Yes, sir.

Q. What was the service of 143 from that time up to this accident—was it continuous or not?

(The foregoing question objected to, which objection the Court sustained.)

Q. Do you know whether or not that service was continuous from the time she was brought here until this accident?

A. No, sir.

Q. Where is 143 now?

A. We didn't have that down here more than eight months.

Q. Did you ever take 143 in from being wrecked?

(The foregoing question objected to, which objection the Court sustained.)

Q. Did you know of 143 climbing the rail before Matt Kelly's death?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I have heard of her.

140 (The foregoing answer objected to, which objection the Court sustained.)

Q. Did you know of it yourself?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't know only from hearsay.

Q. Did you ever go and get her before Kelly's death?

A. Not in that number.

Q. What was her old number?

A. I don't know; the numbers were 373—373 and 374, which one 143 was I don't know.

Q. Is there any other engine now on this division belonging to this company that has the rigid truck and the ball driver that you know?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't know of any.

Q. What sort of trucks do they have?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They have the motion truck and the arch bar truck.

Q. How does the cradle truck and the arch truck relieve the strain that you say occurs on the rigid truck?

(The foregoing question objected to, which objection the Court sustained.)

Q. Do you know whether there are any rigid trucks and bal drivers now being constructed and used by this Company?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't know of any.

Q. Do you know what kind they do use?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

141 A. They are using the motion truck.

(Cross-examined by Mr. Shelby, of counsel for defendant:)

Q. You say you have been an employee of the Chesapeake & Ohio Railway Company for thirty-five years?

A. I have been in their employ since 1878, sir.

Q. And you are now car inspector?

A. I am train inspector.

Q. You started out as what at first?

A. I started out as a laborer in the shop.

Q. And you have advanced in thirty-five years as far as train inspector?

A. Of course I have got down and out a little bit on account of my age.

Q. You never operated an engine, did you?

A. Yes, sir.

Q. Where and when?

A. At Ashland.

Q. To what extent?

A. I have moved them as much as a mile and a fourth.

Q. You never built an engine?

A. No, sir, not right out.

Q. Did you ever work in the shops?

A. Yes, sir, that was my first experience.

Q. What did you do?

A. I labored for quite a while and then went to car building.

Q. What did you do in the way of building an engine?

A. I did the carpenter work.

Q. Did you ever do any of the iron work about it?

A. No, sir.

Q. Now, do you know how what you call the trussed truck is built?

A. Yes, sir.

Q. Explain on that truck (indicating the one on the floor.)

142 A. The rigid truck has a frame extending all around there (indicating) and there is a bar that runs from this down here (indicating) and there is a bottom and a top one and some on this side (indicating), we have two bars running from this frame and the center plate is fastened on to that.

Q. Now you say there is a rigid bar that runs from one side to the other, a bottom and a top one?

A. Yes, sir.

Q. Now what material are they made of?

A. Iron I suppose.

Q. Do you know?

A. I would not say.

Q. Do you know whether they are made of iron or steel?

A. I could not say.

Q. Now then you say there are bars extending from those bars lengthwise from one to the other?

A. Yes, sir.

Q. Now, isn't it a fact that a portion of the casting plate that is used on what you call the rigid truck is bolted to these bars?

A. They are bolted to what we call the center plate.

Q. They are fastened with bolts to those arch bars?

A. Yes, sir.

Q. There is no play to it at all?

A. No, sir.

Q. What is the size of those arch bars?

A. I believe about two inches by one inch.

Q. Isn't it a fact they are five inches wide and an inch and a quarter thick?

A. I don't know.

Q. If you don't know anything about that how do you about the flexibility of the bar?

A. I have my ideas as well as you, and my theories as well as you.

143 Q. How do you theorize about anything you don't know anything about?

(The foregoing question objected to, which objection the Court sustained.)

A. I think you are mistaken about the bar being five inches.

Q. What is your idea of it?

A. I won't be positive about it, but think it is two and a half or three inches.

Q. And you don't know whether they are steel or iron?

A. I am not positive, but think they are iron.

Q. You don't know whether they are wrought iron or cast iron?

A. They are not wrought iron.

Q. Are they malleable?

A. No, sir.

Q. If they were wrought iron, would they bend?

A. If they were not trussed the way they are.

Q. It is the truss that keeps them from bending?

A. Yes, sir.

Q. Then how do they give?

A. There is some give to them.

Q. How can they give if they are fastened that way?

A. Give considerably, it is the spring that is in them.

Q. Is there a spring in wrought iron?

A. A right smart when the weight comes on it.

Q. Which way does it spring?

A. Up and down mostly.

Q. Isn't there any spring sideways?

A. No, sir, none.

Q. There is a spring under the ball of it to relieve the weight on it?

A. Yes, sir.

Q. And the center plate here is fixed exactly the same way?

A. Yes, sir.

Q. Do you know what they call that plate—is it called the female plate?

144 A. I never use that name.

Q. Well that plate fits into this one? (Indicating.)

A. Yes, sir.

Q. And has a play of how much?

A. About quarter of an inch.

Q. Now there is a bolt that comes down through that?

A. Yes, sir.

Q. And it is put in in the same way in what you call the arch bar as it is in this?

A. Yes, sir.

Q. And held in the same way?

A. Yes, sir.

Q. I will get you to explain the difference between this plate and the swinging center plate?

A. Well in this swinging center truck there are bars across here (indicating), and a pin comes through there (indicating), and pins through here (indicating), and there is left I suppose about three-fourths of an inch play up here (indicating), and lets it swing back and forth. The swinging center truck lets the engine swing a little back on the track.

Q. Now, when did they begin first to use that kind of a truck?

A. Which truck?

Q. The one you have just told about?

A. I don't know when.

Q. In explaining about a ball driver used on this kind of a truck, is the tendency of this kind of a truck to pull the ball driver off the track in going around an eight degree curve?

A. The ball driver does no leading at all, the truck has to do it all.

Q. I don't understand you exactly about that. I understood you to say on your main examination to say that the ball driver would be calculated to draw the truck off? That is the way you say now?

145 A. Yes, sir, the pony truck does the leading of that locomotive and if there is not enough weight on the truck the ball will crowd that off.

Q. Do you know how the weight is distributed on an engine?

A. Well from experience there ought to be six or eight tons on that truck.

Q. Then what would there be on the ball driver?

A. I don't know.

Q. Do you know what the width of the face of the ball driver is?

A. About six inches.

Q. What is the width of the face of the other driver with the flange?

A. Between four and three-quarters or five inches.

Q. Do you know whether the ball driver is wider than the other?

A. Well, I don't know.

Q. You have been at one time in charge of a wrecking crew?

A. Yes, sir.

Q. Now isn't it a fact that where a wreck has occurred that your duty there is to take up what has been left, get it out of the way and lay a temporary track so the trains can pass?

A. My duty is to find out the cause and clear the track.

Q. That is a temporary track that you fix?

A. Yes, sir.

Q. You don't have anything to do with the final fixing of the track?

A. No, sir.

Q. You have never had any experience of that kind?

A. No, sir.

Q. And putting it in proper condition for the train to go over at its regular rate of speed?

A. No, sir.

146 Q. And the only operation of an engine that you ever did was that little temporary matter? That operation of an engine in the yard at Ashland?

A. Yes, sir.

Q. And that was at a very slow rate of speed?

A. Yes, sir.

Q. Who first consulted you or talked to you about what you were going to testify to in this case?

A. I don't know who just now. There has been a whole lot of talk about this engine.

Q. I am not asking you about the engine. Who did you talk to in regard to what you would testify to in this case?

A. I don't know as I recollect.

Q. Who first came and asked you about it?

A. I don't remember.

Q. I am talking about since this accident happened—who did you talk to about it?

A. I don't remember, I have talked with lots of people.

Q. Can't remember anybody?

A. No, sir.

Q. Have you talked to anybody representing Mr. Kelly's estate?

A. I have talked to Mr. Williams about it, he came to me for information.

Q. Do you know how he happened to come to you?

A. No, sir.

Q. Where were you?

A. In Ashland.

Q. He is the first man that came to you?

A. Yes, sir, he wanted to know what I knew about the engine.

Q. You don't remember of talking to anybody before that since Mr. Kelly's death?

147 A. No, sir.

Q. Can you say you didn't?

A. I would not like to say, I might have before that.

The next witness introduced on behalf of the plaintiff was T. N. ARMSTRONG, who first being duly sworn testified as follows:

(Direct examination by E. C. O'Rear of Counsel for plaintiff:)

Q. Your name is T. N. Armstrong?

A. Yes, sir.

Q. Where do you live?

A. At Lexington.

Q. What is your age?

A. Forty-six.

Q. By whom are you employed?

A. Chesapeake & Ohio Railway Company.

Q. In what capacity?

A. Locomotive engineer.

Q. Are you so engaged now?

A. Yes, sir.

Q. Have you held other positions with the railroad?

A. Yes, sir. I have been acting Road Foreman for about two years or a little over.

Q. Is that a position superior to locomotive engineer?

A. Yes, sir.

Q. What relationship, if any, do you bear to Matt Kelly?

A. Brother-in-law.

Q. For what length of time did you know Matt Kelly?

A. For twenty-seven years.

148 Q. How familiar, if at all, were you with him?

A. We were very close to each other. Our relations were always very pleasant.

Q. Were you intimate or not?

A. Very intimate, yes, sir.

Q. What was his earning capacity at the time of his death?

A. One hundred and seventy-two dollars per month.

Q. Shortly succeeding his death state whether or not the pay of locomotive engineers of his type and experience was changed?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, it had been increased.

Q. About how much per month?

A. In the neighborhood of twenty dollars.

Q. How long after Matt Kelly's death before that was done?

A. I can't state positively, it was something in the neighborhood of a year I suppose.

Q. State whether or not that is the present salary—about one hundred and ninety-two dollars per month, for men of his type and experience.

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

149 A. Yes sir.

Q. What age was Matt Kelly at the time of his death?

A. He was forty-eight.

Q. Was he a passenger locomotive engineer?

A. Yes sir.

Q. How did his age compare with the age of other men in that service at that time?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. His age was about the average age of engineers on the Lexington division.

Q. What was his condition of health?

A. He was in good health.

Q. What were his habits?

A. He had very regular habits.

Q. What were his habits as to sobriety?

A. He was a very sober and industrious man.

Q. What kind of a man was he as far as economy was concerned?

A. He was a very economical man.

(The foregoing question objected to, which objection the Court overruled, to which ruling of the court defendant excepts.)

Q. What would you say, if you know, as to his efficiency as an engineer?

A. He was a very efficient engineer; he was always considered one of the best men on the road.

150 Q. How many years' experience had he had?

A. I can't state exactly, but in the neighborhood of twenty years, and probably more.

Q. What were his qualities as to carefulness?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He was a very careful man.

Q. State whether or not all of these qualities or any relative to which you have just testified enter into the calculation of determining whether a man is a valuable man to the road and will be continued in service by the road?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They are all considered—the man's character, ability and

industry are all considered and also his sobriety as to whether or not he is a valuable employee.

Q. Is his carefulness considered?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Do you know what the income of the family was during Matt Kelly's life?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I know what it was at the time of his death.

Q. That was one hundred and seventy-two dollars?

A. Yes, sir.

151 Q. State who of Matt Kelly's family, if any, were dependent upon his work.

A. The whole family with the exception of the oldest boy, Sylvester.

Q. Do you know what net income this family has now?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Why, no, I don't know what the net income is, I know about what their gross income is.

Q. What is that?

A. About forty-eight dollars per month.

Q. You know what that is from?

A. Yes, sir, from rented property.

Q. From little property they have in Mt. Sterling?

A. Yes, sir.

Q. Outside of his earnings as a locomotive engineer and that little income from rented property did they have any other income?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir.

Q. And they have no estate of their own?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No sir.

Q. How many years experience did you say you have had as a locomotive engineer?

152 A. Twenty three years.

Q. For this Company?

A. Yes sir.

Q. Did you know engine 143?

A. Yes, sir.

Q. Did you ever run her?

A. Yes, sir.

Q. Did you ever know her before she was engine 143?

A. Yes, sir.

Q. Where did she come from?

A. From the locomotive works.

Q. Where did she come to?

A. The Lexington Division.

Q. Had she been used by some other company?

A. Not only in bringing her from the shop. I don't know what shop she was built in now but think it was in New Jersey.

Q. What was her old number?

A. 374.

Q. Of what company?

A. Newport News & Mississippi Valley.

Q. And her present number is 143?

A. Yes, sir, unless she has been changed.

Q. Do you know the reason of the change in numbers?

A. Well, no, I can't explain. One reason is on account of the Division changing hands and of course they number their engines severally.

153 Q. What sort of a driving wheel and what sort of a truck did engine 143 have under her?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

By Mr. Shelby: Your Honor, please, it is admitted she had the rigid truck.

Q. What sort of driving wheels did she have and what sort of truck?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Like that (indicating) with the exception there were two drivers that had flanges and the others were ball.

Q. By what name was this truck known?

A. It was known as the rigid truck.

Q. What other sort of trucks do they now have?

A. There are three classes of trucks—the solid center bearing truck, the swing center truck and the built up bar truck.

Q. Which is the safest?

A. The swing center truck.

Q. Why?

A. Because it is more flexible; it will give on curves or from any sudden shock.

Q. If they don't give on curves then what happens?

A. There is a great deal of thrust on the outside rail of the curve. If there is not weight enough to keep it on it is liable to go over.

Q. Suppose the outside rail should be worn?

154 A. Then it is more likely to go over.

Q. Mr. Armstrong take the engine 143 with the ball driver on the front wheel, I mean the ball front driver, and with the rigid

truck on an eight degree curve, I wish you would tell the jury what the probability would be as to its climbing the rail?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well in going around a curve, say the *curve* was to the right, these wheels are naturally pressed against the high side of the curve. With the driving wheel here without a flange it will throw more weight on these wheels against the high side of the curve then it would with a flange on the driving wheel for the simple reason that that wheel can go out further on that curve.

Q. And the worn rail would add to the liability of this truck to mount the rail?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, of course.

Q. Now I wish you would describe to the jury your view in reference to the built up truck?

A. There is very little difference in the built-up truck and this truck (Indicating the one on the floor), they are very near the same thing except the built-up truck is a little more flexible; it is not as rigid as that truck, of course that center bar is perfectly rigid.

Q. What about the swing center truck?

A. Well that is very flexible, and it don't throw as much weight against the curve. You see the cradle will receive a great deal of the thrust and will make it ride easier.

155 Q. What will you say as to the quality of the track and rails that good railroad construction requires upon an eight degree curve?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They should be in the highest point of efficiency.

Q. Why is that true?

A. On account of the thrust against the *curve*.

Q. What would you say as to a rail that is worn as badly as that is (Indicating the piece of rail heretofore shown to the jury.) Would that be the highest point of efficiency in good construction?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir.

Q. Would that be as safe as one in its original state?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir, that would not be as safe as a rail in good condition.

Q. Is that a safe rail to use on that sort of a track with an engine with a ball driver and a rigid truck, in your judgment?

(The foregoing question objected to, which objection the Court overruled, to which defendant excepts.)

156 A. In my judgment it is not.

Q. Did you go out to the wreck after it had occurred?

A. No, sir.

Q. Where were you when it happened?

A. Running on the road between Louisville and Lexington.

Q. Has your experience as a locomotive engineer been continuous?

A. Yes, sir, with the exception of two years, I have been acting Road Foreman of engines.

Q. As Road Foreman of engines did that bring you in contact with engines and their construction and safety?

A. Yes, sir.

Q. Now assuming that the train on which Matt Kelly lost his life was running from twenty-five to thirty miles an hour on an eight degree curve and he was operating engine 143 having a front ball driver and a rigid truck, assuming that this piece of rail here—the track on that curve—was worn as bad as that (Indicating) at the point where the wreck occurred, what in your opinion caused that derailment?

By Mr. Shelby: Counsel says it is worn “as bad as that” handing the exhibit to the witness which the Railroad Company itself had furnished.

(Counsel for defendant object to the foregoing question, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. In my opinion the engine with the rigid truck, no flange on the front driver and the worn rail in that condition caused the derailment.

157 Q. How many engines has the Chesapeake & Ohio Railway Company on this division in service?

A. In the neighborhood of eighty.

Q. How many had they at the time of Mr. Kelly's death?

A. Probably about sixty.

Q. Was there any other on this division at that time of this same type?

A. No, sir, I don't believe there was.

Q. Is there any now?

A. No, sir, none of that type now.

Q. Do you know what became of engines 141 and 142?

A. No, sir.

Q. Do you know where 143 is?

A. No, sir, I don't.

Q. Had there been any change on the other two engines before his death as to the flange and ball drivers?

A. I don't know; they left here before that accident happened.

Q. Are any engines now being introduced by this road on this division with the ball drivers and rigid trucks?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir.

Q. Have there been for several years?

A. No, sir, no engines of that kind have been built for several years.

158 Q. State whether or not that is an obsolete style of engine?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, not absolutely as far as service is concerned, but there are no engines of that class built any more.

Q. They still use them because they have them?

A. Yes, sir.

Q. Do you know whether or not the trainmen had made objections to the officials of that company in reference to the ball driver and the rigid truck before Matt Kelly's death?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir, I don't believe I do.

(Cross-examined by Mr. Shelby, of counsel for defendant:)

Q. It is a fact, isn't it, that the type of engines now in use and now being constructed by all roads is very considerably larger than that type of 143?

A. Yes, sir.

Q. It is a fact that the grades on this Lexington Division are exceptionally heavy?

A. Yes, sir.

Q. It is a fact that one grade on that Lexington division is heavier than any grade on the Chesapeake & Ohio road—the one at Corey Hill?

A. Yes, sir.

Q. Either here or in the mountains of Virginia or West Virginia?

A. Yes, sir.

Q. It is a fact that it has been in the development of the railway service found that it greatly conduces to the economy of operating engines to increase the size of the engine so that one engine could pull larger trains?

A. Yes, sir.

Q. And that year by year the size of engines has been increased and the type changed to correspond with the increased size?

A. Yes, sir.

Q. Now at the time of this accident in 1911 you say there were about sixty engines in operation upon this division of the Chesapeake & Ohio Road?

A. Well, I made a mistake; I included the Ashland Division, that includes the Louisville, Lexington and Big Sandy. In this Division alone I could not say exactly, but there wasn't near that many.

Q. You say it was approximately about sixty?

A. Yes, sir, on the whole division.

Q. The engines had grown by that time to be a great deal larger than engine 143?

A. Yes, sir.

Q. And engine 143 was really a light engine as compared with the general type of engine in use at that time, was it not?

A. Yes, sir.

Q. As the size of the engine increased what would be done with the light class of engines on a division where the grades were as heavy as they are on this division?

A. They would do away with them as fast as they could, they would either sell them to some road or put them on some other division where the grade was not as heavy.

160 Q. Now engine 143 was built a new engine about 1890 or '91?

A. Yes, sir, in the neighborhood of that.

Q. Then they came to this division in 1891?

A. They both came to this division at the same time, about 1891 or '92. Three of them came to this division at the same time?

A. Yes, sir.

Q. Those were 372-373 and 374?

A. Yes, sir.

Q. And afterwards when the Newport News and Mississippi Valley went out of existence and the Chesapeake & Ohio took its place the numbers were changed so as to correspond with the consecutive numbers of the Chesapeake & Ohio and which were numbers 141-142 and 143?

A. Yes, sir.

Q. You operated engine 143 a number of times?

A. Yes, sir.

Q. Did you ever operate engine 141?

A. No, sir, I don't think she was ever on this division, that is, after she left here as a freight engine.

Q. It is a fact that both of these engines and all of the engines of her type have been sent away from this division to divisions where the work is not as heavy?

A. Yes, sir.

Q. And isn't it a fact that 143 is in operation on the Cincinnati Division.

A. I don't know, the last I heard of her she was on the Chicago Division.

Q. That is operating through a prairie country?

A. Yes, sir.

161 Q. Now of these sixty engines that were in use at the time of Mr. Kelly's death what proportion of them would you say had the swinging center plate?

A. All freight engines in service, but I cannot recall exactly what engines were in service at that time.

Q. How many pair of wheels has the freight engine in front?

A. One pair.

Q. It was more necessary to provide a more flexible system of construction with one pair of wheels than the two pair?

A. Yes, sir.

Q. And how many of these sixty engines were freight engines?

A. Two-thirds.

Q. About what proportion of the engines in the passenger service have the swinging center plate?

A. I don't believe any at that time.

Q. Of the eighty engines now in use about what proportion of the passenger engines would you say had the swinging center plate?

A. About two-thirds.

Q. And how do those engines compare in size with the type of engine 143?

A. They are larger and heavier engines.

Q. What would you say was the weight of the new passenger engines that have come into use?

A. About eighty or eighty-five tons now.

Q. And how many tons was engine 143?

A. About sixty-five.

Q. It has been estimated that engine 143 in round numbers weighed 133,000 pounds. What would these larger passenger engines weigh?

A. About 160,000 pounds, to 170,000 pounds.

Q. It would be almost impossible, would it not, or rather wholly impracticable, to operate an engine with the front drivers' ball drivers and the center plate a swinging center plate?

A. Yes, sir.

Q. Why would that be?

A. On a curve you see the track would swing so the frame would be out of line with the track and the front driver would drop off.

Q. You could not make them track?

A. No, sir.

Q. How much play do those swinging center plates give?

A. Well, I don't know exactly; I suppose about four to six inches.

Q. Do you think it would give as much as six inches?

A. Yes, sir.

Q. You call this part here (indicating) the center plate?

A. Yes, sir.

Q. And what you mean by the swinging center plate is that this is disconnected from this (indicating) so that there is a play back and forth?

163 A. Yes, sir.

Q. What is it supported by?

A. A frame. Instead of having this bolted casing there are two arches that come clear across and bolt to this frame.

Q. Now in the arch bar type of construction you say it is about as rigid as this (indicating) is it not?

A. Yes, sir, there is some difference.

Q. Those arch bars are rigid steel bars four to five inches broad and from two to two and a half inches thick?

A. About five and two and a half.

Q. Then how many of them were used there?

A. Six I believe. There is one across here (Indicating) and one here (Indicating) and one here (Indicating) and the same number on that side, and then there are two bars that run from the front to the back and this casing is bolted to these bars.

Q. That is what you call a rigid truck?

A. Yes, sir.

Q. Now isn't it a fact that the arch bar type of construction was adopted largely in the matter of economy due to the fact that if this plate shown on the model should break it would take both time and expense to have it renewed whereby in an arch bar truck it would be an easy matter in any of the Company's terminus to have it replaced?

A. Yes, sir, it would be cheaper and more expedient in the repairs.

Q. Now with a rigid truck it has been a common method of engine construction, has it not, to have the front drivers ball drivers?

A. Until recent years it has.

164 Q. Take this model of an engine which I now show you.

These three large wheels that are shown there represent the drivers and the two small wheels represent the wheels of the truck?

A. Yes, sir.

Q. What you mean by the type of engine to which 143 belonged is that this front driving wheel didn't have the flange on it?

A. Yes, sir.

Q. Now it is a fact is it not that the only difference in the width of the ball wheel and the flange wheel is in the space that is taken up by the flange, is it not?

A. Yes, sir.

Q. The width of the surface that binds on the rail is increased by the width of the flange when you take off the flange?

A. Yes, sir.

Q. Isn't it a fact that without the flange the front driving wheel has more play upon the rail and a wider surface to play upon and will go around a curve more easily?

A. Yes, sir.

Q. Owing to that, is it not a fact that by having the front wheel ball driver you secure in the wheel base of the engine (that is the wheel base made by the drivers) a less rigid wheel base?

A. Yes, sir.

Q. That has been considered in some respects desirable as affording more safety in making a curve?

A. Yes, sir.

Q. So that with the use of the rigid truck it was a theory, 65 whether it is correct or not, in locomotive construction that it was desirable to have the front drive wheels ball drivers in order to secure a less rigid wheel base and to make the strain less upon the truck wheels?

A. That is the reason.

Q. I say is it not a fact that that theory was entertained?

A. Yes, sir.

Q. Now is it a fact or not that with this type of truck and with the flange on the two rear drivers that the front driver, even if it had a flange on it, would chop the rail or not?

A. Yes, sir, it would.

Q. Notwithstanding the rigidity of the wheel base created by the flange?

A. Well it would make an entire rigid wheel base.

Q. Why would you take them off the second pair of driving wheels any more than the front?

A. I would not take them off as far as I am concerned, but that was the object in making a more flexible engine on a curve.

Q. And that is a desired feature, is it not?

A. Yes, sir.

Q. To make it go round as easily as possible?

A. Yes, sir.

Q. What would be the proper brakes in going around a curve for an engineer as to his air, does he put his air on as he approaches the curve? Does he take the curve at the same rate of speed as he does on a straight line?

166 A. My idea and others are different. The instructions, as I understand them, are that the brake should be released before going around a curve so as to allow the engine to go around easily. Other men have different opinions about it.

Q. Now you say that your idea is that before you take the curve you release your air?

A. Yes, sir.

Q. Then your air has been applied before you get to the curve?

A. Yes, sir.

Q. Why is that done?

A. Well it is necessary to reduce the speed on approaching a curve; that is, if you are running at an excessive rate, of course it all depends on the degree of the curve; taking a short curve at a high rate of speed before you get to it it is customary to reduce the speed of the train so the train will go around the curve easily.

Q. As the engineer approaches the curve he applies his air, reduces his speed and then the rule practice is as he strikes the curve to release his air so the train will go round the curve easily?

A. Yes, sir, that is my opinion.

Q. Now it is a fact that a train running on a straight track would have a tendency to move in the direction in which it is moving?

A. Yes, sir.

167 Q. And the object in reducing the speed as you approach the curve is to divert the tendency of the engine to continue on that straight line and go over the rail, is it not?

A. Yes, sir.

Q. Mr. Armstrong you used this engine 143 when you were running on the Louisville Division, did you not, between Lexington and Louisville?

A. Yes, sir.

Q. How long?

A. I only run her extra. I wasn't in the regular passenger service, only an extra man, and I wasn't on the engine a great deal, although I had run the engine several trips.

Q. How long would you say you used that engine?

A. I could not state that with any degree of accuracy.

Q. She was on the regular passenger service running from Lexington to Louisville on those fast passenger trains?

A. Yes, sir.

Q. What is the fact as to the curves on that line between Lexington and Louisville, especially between Lexington and Frankfort.

A. Well the curves are pretty bad.

Q. Isn't it a fact there are twelve and fifteen degree curves?

A. Thirteen I believe is the highest. There is one thirteen degree curve and two or three ten or eleven degree curves.

Q. You have run engines over that road frequently?

A. Yes, sir.

68 Q. Did you say or not that you had run engine 143?

A. Yes, sir.

Q. On what road?

A. Between Lexington and Louisville.

Q. And engine 142 was a sister engine to 143?

A. Yes, sir.

Q. How many other engines Mr. Armstrong were there of that same type in your experience belonging to this Company?

A. The three are all that I know of.

Q. Did you know 126-128 and 129?

A. Yes, sir.

Q. Isn't it a fact that each of these engines had ball drivers?

A. At one time, yes, sir.

Q. What sort of a truck did they have?

A. A built-up bar truck.

Q. A rigid truck?

A. Yes, sir.

Q. Now what was the weight of those three engines—126-128 and 129?

A. Approximately the same as 143, there was some difference. These were about a ton heavier.

Q. Do you know what sort of an engine there is on the K. & A. road now?

A. No, sir, I am not familiar with it, I know what engine used to be there.

Q. Do you know the number of it?

69 A. 184 used to be there; I think that is the only engine of that kind.

Q. Don't you know it has the same kind of truck that this engine has?

A. I never run her.

Q. They are the same practically as far as the flexibility is concerned? It has a ball driver in front?

A. I don't know.

Q. Do you know how long 143 has been on the Cincinnati division?

By Judge O'Rear: The witness has said that he didn't know whether it had been there at all or not.

A. I don't know whether it has been there at all or not.

Q. Do you know how long it has been up there on that division?

A. No, sir.

Q. Was it in the passenger service between Cincinnati and Chicago?

A. I believe it was; of course I don't know anything about it.

Q. Did you when you were running 142 and 143 over the Lexington and Louisville division have any trouble with them?

A. No, sir.

170 Q. Wasn't 143 an old freight engine? Wasn't she originally built that way and used as such for a number of years?

A. Yes, sir, but I don't know how long.

Q. You have been asked whether or not the engines that are being constructed now are of heavier type, and you said yes. Now are they not the engines that are being manufactured for freight service and are they not taking their freight engines and pressing them into the passenger service?

A. No, sir, the engines they are building are both freight and passenger.

Q. They are heavier in some particulars?

A. Yes, sir.

Q. They are not building any more ball drivers and rigid trucks

(The foregoing question objected to, which objection the Court sustained.)

Q. Now something has been said to you about the curves on the Louisville and Lexington Division, I will ask you if they have provided against those stiff curves by putting inside tracks there?

A. Yes, sir.

Q. Does that make them safer?

(The foregoing question objected to which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Now something has been said to you about the rate of speed on a curve and a straight line. What is the schedule allowed by that Company at the point where this accident occurred?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

171 A. Thirty miles an hour.

Q. And that is on a curve isn't it?

A. Yes, sir.

Q. They have asked you about this carload where 184 run. What is the schedule there?

A. I think it is fifteen miles an hour.

Q. Now further referring to this short curve at Frankfort—I will ask you if the engineers have orders to slow up to fifteen miles an hour on the crossing there at Frankfort and to twenty-five an hour on the rest of them? That is, the L. & N. curve to which Mr. Shell has referred?

A. Yes, sir.

Q. Is there any such order in reference to this place where Mr. Kelly was killed?

- A. There is an order not to exceed thirty miles an hour.
Q. The order was for a schedule between Aden and Leon not to exceed thirty miles an hour?
A. Yes, sir.
Q. What is the distance to which the thirty-mile schedule applies?
A. Four miles.
Q. Where?
A. Between Leon and Aden.
Q. Now what was the schedule they had for that four miles?
A. I don't know what it is now, I am not very familiar with it, don't run up there.
172 Q. What was it about the time of Mr. Kelly's death?
A. I think the schedule was eight minutes.
Q. Wasn't it eleven?
A. I don't remember. I wasn't very familiar with the conditions up there.
Q. You are not familiar with the total schedule?
A. I am with the rate but not with the schedule and conditions.
Q. Now you speak about one of the curves on the Lexington and Frankfort Division, being a curve where?
A. That is a curve on the Frankfort hill.
Q. What is the degree of curve there?
A. It is a ten or eleven degree curve.
Q. They are very stiff curves between Louisville and Frankfort?
A. Yes, sir.
Q. Are there any curves between Aden and Leon that are as great as a ten, eleven or thirteen degree curve?
A. I don't know whether any of them go as high as ten or not.
Q. This curve where the accident occurred was on an eight degrees curve?
A. Yes, sir, that is about the average curve between Aden and Leon.

173 The next witness introduced on behalf of the plaintiff was Capt. C. H. PETRY, who first being duly sworn testified as follows:

(Direct examination by E. C. O'Rear, of counsel for plaintiff:)

- Q. Your name is C. H. Petry?
A. Yes, sir.
Q. You live in Mt. Sterling?
A. Yes, sir.
Q. What is your business now?
A. I am in the flour mill business.
Q. Were you ever in the railroad business?
A. Yes, sir.
Q. How long were you in that business Captain?
A. About twenty-three years with about a year and a half off.
Q. In what capacity?
A. Brakeman, yard master and conductor.

- Q. What roads were your experiences on?
A. On the L. C. & L. and afterwards what is known as the K. S. A. Road.
Q. Part of that time you were in the service of the Chesapeake Ohio Railway Company?
A. Yes, sir.
Q. Were you acquainted with Matt Kelly?
A. Yes, sir.
- 174 Q. How long did you know him?
A. Thirty-two or three years.
Q. How long had you known him to be in the railroad service?
A. About thirty-two years.
Q. What was his first employment in the railroad service?
A. He first worked as a section hand.
Q. How old was he then?
A. He was young, about seventeen or eighteen.
Q. What was his next service?
A. Brakesman.
Q. How long did he serve as brakesman?
A. I don't remember, something less than a year.
Q. Then what did he do?
A. He was fireman.
Q. Do you know how long it was before he became an engineer?
A. No, sir, I do not, several years.
Q. How long were you conductor on what is now called the Kentucky & South Atlantic road?
A. Thirteen years.
Q. During that time who was your engineer?
A. I had quite a number of them.
Q. I mean to say was Matt Kelly your engineer during any that time?
A. Yes, sir.
- 175 Q. How long did he serve you?
A. I cannot tell you that; probably four or five years.
Q. Please tell the Jury what kind of an engineer he was?
(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)
A. He was a good engineer.
Q. Tell the jury about his sobriety?
(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)
A. He was a sober man.
Q. What about his industry?
(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)
A. He was an industrious man.
Q. What about his carefulness?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He was a very careful man.

Q. State to the jury what qualities go to make up a desirable locomotive engineer?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

176 A. That is a broad question.

Q. I know it is a little broad, but he was a pretty broad man.

A. It is necessary for him to be an intelligent man, a sober man, a careful man, a man who has enough natural sense to be a mechanic, and in every sense of the word it requires a man above the ordinary man.

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Q. I will get you to state whether or not Matt Kelly possessed the requirements which you have named?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. In my judgment he possessed every one of them.

Q. What about Matt's application—I mean whether or not he was a man who stuck close to work or would work a while and lay off a while?

(The foregoing question objected to, which objection the Court sustained.)

Q. Now what about Mr. Kelly's habits as to frugality and thrift?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

177 A. He was of a saving disposition, never fooled away any money and never had any bad habits; he saved his money.

Q. Do you know his family?

A. Yes, sir.

Q. Did you know him in his family?

A. No, sir, I did not.

Q. Do you know what the state of his health was?

A. I would not say I knew what his health was; he appeared to be healthy.

Q. You have been in the railway service how long?

A. About twenty-three years with the exception of about eighteen months.

Q. You know it to be a fact then that the occupation of a locomotive engineer is of necessity a very dangerous occupation?

A. Yes, sir.

Q. Do you know whether Mr. Kelly was afflicted in any way by varicose veins?

A. No, sir, I don't know.

Q. Do you know whether he were a rubber stocking for that trouble?

A. No, sir, I don't know.

(Redirect examined:)

Q. Don't the danger of being a locomotive engineer depend upon the kind of roadbed and the kind of machinery they furnish you.

178 (The foregoing question objected to, which objection the Court sustained.)

The first witness introduced on behalf of the plaintiff was W. A. SAMUELS, who first being duly sworn testified as follows:

Q. Your name is W. A. Samuels?

A. Yes, sir.

Q. Do you hold any official position in this community?

A. Yes, sir.

Q. What is that?

A. Mayor of Mt. Sterling.

Q. How long have you been Mayor?

A. About four years.

Q. Were you acquainted with Matt Kelly?

A. Yes, sir.

Q. Did he hold any official position in Mt. Sterling?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. What was it?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He was Councilman in the second ward.

Q. Do you know how long he held that position?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

179 A. Some three and a half or four years.

Q. Did he hold it more than once?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Had there been an intervening period between the service?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. I will get you to state what opportunities you had of judging Mr. Kelly's business capacity, his judgment and good sense?

A. (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I had a good opportunity.

Q. What about his habits of frugality and thrift?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They were good.

Q. What about his industry?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He was an industrious man.

Q. What about his sobriety?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He was a sober man.

180 Q. Did the councilmen receive a salary?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Three dollars for each meeting; about thirty-six dollars a year.

The next witness introduced on behalf of the plaintiff was A. A. HAZELRIGG, who first being duly sworn testified as follows:

Q. Your name is A. A. Hazelrigg?

A. Yes, sir.

Q. You are a citizen of Montgomery County?

A. Yes, sir.

Q. What official position have you held in this county?

A. City Attorney, County Attorney, County Clerk and County Judge.

Q. Did you know Matt Kelly?

A. I did.

Q. How long did you know him?

A. Thirty years at least.

Q. You have lived here all your life?

A. Yes, sir.

181 Q. He had also?

A. Yes, sir.

Q. I will get you to state to the Jury as to the character or ability of Matt Kelly as a business man; in other words, as an earning factor?

A. He was an industrious man, a good business man, sober and had good judgment.

Q. You are an attorney at law?

A. Yes, sir.

Q. Are you familiar with the life tables?

A. Yes, sir.

Q. I will ask you before referring to these tables—Was your acquaintance with Mr. Kelly such as to give you any personal association with him?

A. Yes, sir.

Q. Did you hunt with him?

A. No, sir.

Q. What was the state of his health?

A. As far as I know it was good. He appeared to be healthy.

Q. He appeared to be a vigorous strong man?

A. Yes, sir.

Q. You have before you there the life table showing the expectancy of lives?

A. Yes, sir.

Q. What is the expectancy age of a man forty-eight years old?

A. 22.27 years.

Q. That is Dr. Wigglesworth's table of mortality?

A. Yes, sir.

182 Q. What is the expectancy of a man of ordinary health forty-six years of age according to this table?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. 23.37.

Q. What is the expectancy of a boy in good health sixteen years of age?

(The foregoing question objected to, which objection the Court sustained.)

(Cross-examined:)

Q. Do you know what those tables are made up from as to the expectancy of life?

A. No, sir, I presume upon the lives of persons who are healthy. They have been approved by the Court of Appeals.

Q. Does that expectancy apply to persons who are following extra hazardous occupations?

A. I am not prepared to say.

Q. What is the character of the occupation of locomotive engineer?

A. It is dangerous.

Q. Is it or not an extra hazardous occupation?

A. It is hazardous.

Q. Do you know of any other occupation that is considered more hazardous?

A. Yes, sir, there are several I would consider more so.

Q. I mean in a legal way. Is it or not a fact that there — two other things that are considered more hazardous than a locomotive engineer's occupation—one an aviator and the other a keeper of a bar-room?

183 A. I consider several things more hazardous than that. I consider the man that goes into a bar-room in a more dangerous position than the man who operates it.

Q. Do you know whether there is any difference made in the life insurance as between persons of ordinary occupation and the occupation of a locomotive engineer?

A. I think there is; they come under different classes.

Q. Isn't their expectancy of life considered much less?

A. I don't know about that. I know there is possibly a slight increase of rate on the insurance.

Q. Do you or not know that a great many of insurance companies won't take that kind of a risk at all?

A. I will say that I asked an insurance man once about it and he said they would insure them but make a difference in the rate.

Q. Do you know whether or not there is a difference in the accident insurance in the locomotive engineer and a person of ordinary occupation?

A. Only from what I have heard. I think they charge a little different rate.

Q. Did you ever know what the rate was in the accident policies?

A. No, sir, I was referring to ordinary life insurance.

(Re-examination:)

Q. Among the occupations more hazardous what about the person that works in a mill?

A. That is one I had in mind.

184 Q. What about glass blowers?

A. I don't know about them, I would think that would be regarded as hazardous.

Q. What about the people that work in the coal mines?

A. That is hazardous.

Q. The work of a carpenter is sometimes more hazardous than the work of a preacher?

A. Well, I don't know about that.

The next witness introduced on behalf of the plaintiff was C. D. GRUBBS, who first being duly sworn testified as follows:

Q. Your name is C. D. Grubbs?

A. Yes, sir.

Q. You are a citizen of this town?

A. Yes, sir.

Q. You have been subpoenaed as a witness in this case?

A. I have.

Q. Were you acquainted with Matt Kelly?

A. Yes, sir.

Q. How long had you known him?

A. Possibly twenty years.

Q. Are you a man of family?

A. Yes, sir.

Q. You have children about grown?

A. I have two, one is about twenty-one and the other nineteen.

185 Q. Have you acted as guardian or trustee for infants?

A. I have never acted as guardian.

Q. You are an attorney at law?

A. I am.

Q. Mr. Grubbs what would be a fair reasonable price for the boy to clothe him, board him and educate him from the time he was three years old until he is twenty-one?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well that would depend upon one's income.

Q. Take a man that has an income from his labor of from one hundred and seventy-two to one hundred and ninety-one dollars a month; that he has an income from his property of about forty dollars a month; that he himself is a man of frugal habits, industrious and temperate habits, a thrifty sensible man; in other words, I will take Matt Kelly as the man with that income as I have stated, now what would it reasonably cost to board, clothe, educate and support that child, do everything for him that his father should have done and could have done if he had lived?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

186 A. Well basing my answer upon the hypothetical question you have asked and also from my judgment gained from experience and observation. I would say that a man situated as Matt Kelly was, having the income he had and the family he had, they spend on the children say from three years up to sixteen or seventeen, the age when they would go off to school, possibly two hundred dollars a year each; and then if they were sent to school from sixteen to twenty-one the cost of each would be much greater.

Q. How much greater?

A. Well sending a boy to school away from home and pay all of his necessary expenses, clothing, education, board, incidental expenses, doctor's bills, and things of that sort that would naturally come within the range of necessary expenses, would involve a cost of something like four hundred dollars a year, from ten years up to twenty one.

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

Q. Are those figures based upon the fact to some extent that Mr. Kelly had six children?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I was taking that into consideration.

Q. Mr. Grubbs I am going to ask you the question in another way. Take the youngest child, Richard, three years of age at his father's death, disregarding the fact that there are other children in the family to be provided for, what would be the reasonable cost if you were to hire some one to do for him what a father would do in boarding, clothing, nurturing, training and educating that child to manhood so as to equip him for some occupation in life?

187 (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well the cost would increase all the while from year to year, it would run about the same from the time the child is three years old until he was seven or eight and then there would be an increase until the child is possible fourteen or fifteen and then there would be a marked increase until he is twenty-one.

Q. Mr. Grubbs you have children, both a son and a daughter?

A. Yes, sir, my oldest is a daughter and the younger a son.

Q. Is there a difference in the cost of the education and training and support between daughters and sons, and if so in whose favor is the difference?

A. I have known it to be and found it to be that the daughter costs the most.

Q. One of these children of Mr. Kelly's is a daughter; she was ten years old at the time of her father's death, she is now twelve; has attended school since she was six, is in the seventh grade, apparently in good health, what would be a fair and reasonable allowance or price to take that child at the age she was and to educate her, clothe her and train her and give her that which a father could have given her until she is twenty-one years old to fit her for mature useful life, a self-sustaining life?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

188 A. Well if she is a girl it would cost in my judgment from the time she was ten up until she was seventeen at home possibly two hundred to two hundred and fifty dollars a year, and then if she is sent off to school her expenses would be as much as five hundred dollars for the time she is away.

Q. Do you hold any official position in reference to education in this county?

A. I do.

Q. What is it?

A. I am Trustee of the Public Graded School.

Q. How long have you been trustee?

A. About ten years.

Q. You have given the study of the cost of education some thought?

A. Not in connection with my duties as trustees but the thought I had given it is the experience I have had in my own family.

Q. Do you give some personal attention to the school here?

A. Yes, sir.

Q. Do you know whether Mr. Matt Kelly at the time of his death had all of his children except his oldest son and his little son in this school?

A. No, sir, I just know in a general way but which ones attended, I do not know.

Q. What are the school facilities in this community?

A. Well the school here is a public graded school which embraces

the city of Mt. Sterling and consists of the Grammer school course and the High School course.

Q. Is there any college or university in this community?

189 (The foregoing question objected to, which objection the Court overruled, exception.)

A. There is not.

Q. Are there any in this part of the State?

A. No, sir, not around here; if one should seek the advantage of a college education they would have to go elsewhere than here.

Q. Where are the nearest colleges or universities to this community?

A. Well the State University at Lexington, and there is a school at Shelbyville and one at Danville and one at Winchester.

Q. What would be a reasonable fair price or compensation for the maintenance of the widow, Mrs. Kelly, per year?

190 (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Well, I don't know as I understand what your question embraces.

Q. I mean by maintenance, all the support that a wife would derive from a husband, having the family that Mr. Kelly had and the earning capacity that he had, taking into consideration their ages?

A. In my judgment the amount expended on her would necessarily, I should think, be as much as four hundred dollars a year.

Q. Would not that really be a minimum of the necessary expenses?

A. In my judgment it would; I don't think she can be maintained, clothed, fed and supported on four hundred dollars a year.

Q. As touching your own qualifications, I desire to ask you further as to your business experience. What other business experience have you had in this community?

A. I have been practicing law for twelve or fourteen years; prior to that time I was connected with the dry goods business for a few years, and prior to that time was Teller in a bank for four or five years.

Q. Were you a member of the dry goods firm of J. D. Hazelrigg & Son?

A. I was for a while.

Q. While you were interested in that business did you give attention to the character of the business and the trade and things of that kind?

A. I did.

191 (The defendant having objected and excepted to each question addressed to and answer made by the witness relative to the cost of maintaining and educating a child, now moves the Court to strike from the record the several answers made to said questions, respectively, by the witness, which motion the Court overruled, to which ruling of the Court defendant excepts.)

(Cross-examined:)

Q. Mr. Grubbs say that Mr. Kelly was earning as much as two thousand dollars a year, after taking what would be a reasonable amount for his own support, and say that he had twenty-two years which to live, what would be the present value of his earnings at rate?

A. I don't know, I would have to make a calculation.

Q. Mr. Grubbs there is a college at Winchester, isn't there?

A. I think I said there was a school there.

Q. The school here grants diplomas?

A. Yes, sir.

Q. Your daughter attended that school?

A. She did.

92 The next witness introduced on behalf of the plaintiff was W. A. SUTTON, who first being duly sworn testified as follows:

Q. You are a citizen of Mt. Sterling?

A. Yes sir.

By Judge Apperson: Mr. Sutton you have been in here during the examination of Mr. Grubbs?

A. No, sir, I have not.

Q. You are in business here?

A. Yes, sir.

Q. In what business are you engaged?

A. In the Furniture & Undertaking business.

Q. How long have you been in that business?

A. For twenty-three years.

Q. Did you know Matt Kelly?

A. Yes, sir.

Q. Do you know his family?

A. Yes, sir.

Q. You are a man of family?

A. Yes, sir.

Q. You have children?

A. Yes, sir, two.

Q. What in your opinion would be a fair and reasonable compensation or price or allowance for the maintenance and support of Mrs. Addie Kelly, widow of Matt Kelly, per year?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

93 A. I would think from four to four hundred and fifty dollars a year; I never kept any account of those things and don't know exactly.

Q. What would be a fair, reasonable allowance and price to take a child say at any age from three years up until twenty-one, to maintain it; that is to clothe, board, educate, nurture and care as a father would be expected to do from the earning capacity and income of Matt Kelly?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I would say to take a child and feed it and clothe it and school it would cost, up until it is fifteen, about one hundred and fifty dollars to two hundred dollars a year, and from that time on about four or five hundred dollars per year.

The defendant having objected and excepted to each question addressed to and answer made by the witness relative to the cost of maintaining and educating a child, now moves the Court to strike from the record the several answers made to said questions, respectively, by the witness, which motion the Court overruled, to which ruling of the Court defendant excepts.

194 The next witness introduced on behalf of the plaintiff was JNO. G. WINN, who first being duly sworn testified as follows:

Q. Mr. Winn you are a citizen of Mt. Sterling?

A. I am.

Q. How long have you lived here?

A. Fifty years.

Q. What is your profession?

A. A practicing attorney, and at present am President of The Montgomery National Bank.

Q. Were you acquainted with Matt Kelly in his lifetime?

A. I was.

Q. Were you acquainted with his habits of thrift and economy and industry?

A. In a general way, yes, sir. I wasn't intimate with him, but I have known him for a great many years, and knew him as an economical man.

Q. Mr. Winn have you a family of your own?

A. I have.

Q. Have you reared children to maturity, about?

A. I have one son who is twenty-one years old.

Q. And other children?

A. One other and have had still another.

Q. Have you acted as guardian or trustee for children?

A. Yes, sir, three or four children at different times.

Q. Are you acquainted with the cost of living in this community?

A. I suppose I am.

195 Q. What would be a reasonable allowance or price or charge for the maintenance of the children of Matt Kelly whose ages ranged from the time of his death from three years to sixteen, I believe: maintenance to include, sir, for each of them, education, board, clothing, nurture and care, and all of those things of that character which a father gives to his children and which could be procured from another who is hired to render the service?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I think on a general average for each child it would take about two hundred and fifty dollars a year as near as I can get at it.

Q. Did you take into consideration the earning capacity of Mr. Kelly, which was something like two thousand or twenty-two hundred dollars a year?

A. Yes, sir, I bore that in mind on the idea that a man who made more would spend more on his children and a man who made less would spend less on his children.

(Cross-ex.:)

The defendant having objected and excepted to each question addressed to and answer made by the witness relative to the cost of maintaining and educating a child, now moves the Court to strike from the record the several answers made to said questions, respectively by the witness, which motion the Court overruled, to which ruling of the Court defendant excepts.

196 (Cross-examined:)

Q. In estimating the amount for each child did you take into consideration in connection with the two thousand dollars that he had to support himself also?

A. I did.

The plaintiff announced through her attorneys that she desired the witness, Dr. J. F. REYNOLDS, recalled for further examination.

The witness having heretofore been sworn testifies as follows:

Q. Have you a family, Doctor?

A. I have.

Q. Taking into consideration this child of Matt Kelly's, Tom, I will ask you, considering his physical condition, what it would reasonably be worth for his maintenance a year from the time of his father's death until he was twenty-one; maintenance to include, sir, board, clothing, necessary attention of physician, nurture, training and care, such as a father would have given such a son and such as might be hired to be done for him now with money?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. It depends on how a child is raised. I think five hundred dollars would be a very reasonable amount. I think that is as little as it could be done for.

Q. You have children?

A. Yes, sir.

197 The defendant having objected and excepted to each question addressed to and answer made by the witness relative to the cost of maintaining and educating a child, now moves the Court to strike from the record the several answers made to said questions, respectively, by the witness, which motion the Court overruled, to which ruling of the Court defendant excepts.)

The next witness introduced on behalf of the plaintiff was Dr. J. H. TAULBEE, who first being duly sworn testified as follows:

Q. Your name is J. H. Taulbee?

A. Yes, sir.

Q. What is your profession?

A. I am a physician.

Q. Where is your present residence?

A. At Lexington.

Q. Did you ever live at Mt. Sterling?

A. Yes, sir.

Q. Practice your profession here?

A. Yes, sir.

Q. How long did you practice your profession here?

A. Seven or eight years.

Q. Were you acquainted with Matt Kelly?

A. Yes, sir.

Q. Slightly or intimately?

A. I was very intimately acquainted with him.

198 Q. Were you anyways related to him by marriage?

A. Yes, sir, my wife was a cousin of his.

Q. By reason of your relationship with him what opportunity did you have for knowing about his health and his earning capacity?

A. I saw him frequently in his home.

Q. What was the state of his health?

A. It was good. He had a little nasal trouble at one time but outside of that I don't remember of him being sick any.

Q. How long was that before his death?

A. Fifteen or eighteen years ago.

Q. State to the jury whether or not he had recovered from that?

A. Yes, sir, I think he had thoroughly.

Q. You say that you visited him in his family?

A. Yes, sir.

Q. You are acquainted with his family and his children?

A. Yes, sir.

Q. What were the habits of Matt Kelly as to economy and thrift?

A. He was a very economical and a very thrifty man.

Q. What proportion of his income did he spend upon his family?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

199 A. I think all of it; I don't know of any he spent on the outside.

Q. Was he a man whose personal expenditures were large or small.

A. Very small I think.

Q. Do you know anything of what he did towards educating his family, indicating his plan or purpose with respect to that subject?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, I have heard him express himself along that line I think.

Q. To what effect?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. His desire was to give his family all the chances he possibly could.

Q. Had any of his children advanced far enough to be sent away to college?

A. No, sir, not before his death.

Q. What concern, if any, had Mr. Kelly shown or betokened in the progress of his children towards an education?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't know that I thoroughly catch your meaning.

Q. The question is, whether or not Mr. Kelly showed any interest or concern as to how his children progressed in school?

A. Yes, sir, he did.

200 Q. Did he take any interest, or encourage or assist them in their education?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Cross-examined:

Q. How long has it been since you lived in Mt. Sterling?

A. I moved away from here in 1896.

Q. How often were you back here from that time on up to his death?

A. Frequently, I should say at least once a month.

Q. Now how many times in a year would you be at Mr. Kelly's house after you left here?

A. I couldn't hardly state that; I suppose half a dozen times.

Q. Were you there in the daytime or night?

A. Usually in the evening.

Q. After you moved to Owingsville?

A. Yes, sir.

Q. Would you stay there all night?

A. No, sir.

Q. How often in a year after you moved to Owingsville would you come here and be at his house of an evening?

A. I could not say, I suppose half a dozen times while I was in Owingsville.

201 Q. That is the only time that Mr. Kelly would be at home?

A. I don't know about that.

Q. Did you ever find him at home any other time?

A. Yes, sir.

Q. I mean at his house?

A. I don't know that I was ever there at any other time.

The next witness introduced on behalf of the plaintiff was Dr. J. H. TAULBEE, who first being duly sworn testified as follows:

Q. Your name is J. H. Taulbee?

A. Yes, sir.

Q. What is your profession?

A. I am a physician.

Q. Where is your present residence?

A. At Lexington.

Q. Did you ever live at Mt. Sterling?

A. Yes, sir.

Q. Practice your profession here?

A. Yes, sir.

Q. How long did you practice your profession here?

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A. It was good. He had a little nasal trouble at one time but outside of that I don't remember of him being sick any.

Q. How long was that before his death?

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Q. State to the jury whether or not he had recovered from that?

A. Yes, sir, I think he had thoroughly.

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A. Yes, sir.

Q. You are acquainted with his family and his children?

A. Yes, sir.

Q. What were the habits of Matt Kelly as to economy and thrift?

A. He was a very economical and a very thrifty man.

Q. What proportion of his income did he spend upon his family?

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Q. Was he a man whose personal expenditures were large or small.

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Q. Do you know anything of what he did towards educating his family, indicating his plan or purpose with respect to that subject?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir, I have heard him express himself along that line think.

Q. To what effect?

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Q. How long has it been since you lived in Mt. Sterling?

A. I moved away from here in 1896.

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Q. Now how many times in a year would you be at Mr. Kelly's house after you left here?

A. I couldn't hardly state that; I suppose half a dozen times.

Q. Were you there in the daytime or night?

A. Usually in the evening.

Q. After you moved to Owingsville?

A. Yes, sir.

Q. Would you stay there all night?

A. No, sir.

Q. How often in a year after you moved to Owingsville would you come here and be at his house of an evening?

A. I could not say, I suppose half a dozen times while I was in Owingsville.

201 Q. That is the only time that Mr. Kelly would be at home?

A. I don't know about that.

Q. Did you ever find him at home any other time?

A. Yes, sir.

Q. I mean at his house?

A. I don't know that I was ever there at any other time.

Q. Can you fix any time when you had a talk with Mr. Kelly in regard to his desires about his family?

A. Yes, sir.

Q. When?

A. After I moved to Lexington.

Q. When did you move to Lexington?

A. I have been living in Lexington four years.

Q. How long was it after you went to Lexington?

A. One or two years.

The next witness introduced on behalf of the plaintiff was Dr. P. K. McKenna, who first being duly sworn testified as follows:

Q. Your name is P. K. McKenna?

A. Yes, sir.

Q. What is your profession?

A. I am a physician.

Q. Were you acquainted with Matt Kelly in his lifetime?

A. Yes, sir.

Q. Did you attend him or his family professionally?

A. Yes, sir, at different times.

Q. What was the relation of acquaintance between you and Mr. Kelly?

202 A. We were the best of friends.

Q. Was your association one of intimacy or otherwise?

A. Yes, sir, we were intimately associated.

Q. What was the condition of Mr. Kelly's health up to the time of his death?

(The foregoing question objected to, which objection the Court overruled, to which ruling the Court defendant excepts.)

A. So far as I know it was in perfect condition.

By the Court: That answer is not competent and the Jury will not consider it.

Q. Did Mr. Kelly ever discuss with you the question of the education of his children and of his purposes with respect thereto?

A. Yes, sir.

Q. What was that purpose as he expressed it to you?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. He often said that his one aim in life was to acquire enough so as to give each one of his children a good education.

Cross-examined:

Q. Did you ever treat Mr. Kelly?

A. No, sir.

Q. Do you know whether or not he had varicose veins?

A. No, sir.

203 Q. Do you say he didn't have?

A. I don't know.

Q. You never examined him to know that?

A. No, sir, I never gave him a dose of medicine in my life.

Re-examined:

Q. He never complained to you about anything of that kind?

A. No, sir.

Counsel for plaintiff announce that the plaintiff rested her case here in chief.

Counsel for defendant desires to recall the witness, T. N. Armstrong for further cross-examination.

Q. Mr. Armstrong did Mr. Kelly have varicose veins?

A. Yes, sir.

Q. Did he wear a rubber stocking?

A. Yes, sir.

Re-examined:

Q. How long was that before his death?

A. I don't know whether he was wearing the rubber stocking at the time of his death or not.

Q. Don't you know he had recovered from that?

A. I was under the impression he had recovered.

Q. The latter years before his death had you heard any complaint from him on the subject?

A. No, sir.

204 The defendant thereupon moved the Court to instruct the Jury to find for the defendant. The Court overruled the motion and refused to instruct the Jury peremptorily to find for the defendant.

Thereupon defendant moved the Court to exclude from the Jury so much of the testimony of T. N. Armstrong as states the salary or pay of engineers was increased twenty dollars per month after the death of Matt Kelly. The court overruled the motion and refused to exclude said testimony from the Jury.

Thereupon the defendant introduced the following testimony, to-wit:

The first witness introduced on behalf of the defendant was GEORGE ROBINSON, who first being duly sworn testified as follows:

Direct examination by Mr. Shelby:

Q. Your name is George Robinson?

A. Yes, sir.

Q. Where do you live?

A. At Lexington.

Q. What is your present position with the Chesapeake & Ohio Railway Company?

A. Master mechanic.

Q. What part of the road is under your jurisdiction?

A. Lexington and Big Sandy.

Q. That is, the Lexington Division, from Lexington to Louisville, from Ashland to Lexington and from Ashland up the Big Sandy?

A. Yes, sir.

205 Q. You have charge of the mechanical business for those divisions?

A. Yes, sir.

Q. How long have you been at Lexington as Master Mechanic?

A. Since July, 1911.

Q. How long have you been in the mechanical department of the company?

A. Since 1893.

Q. What position were you holding before you became the Master Mechanic at Lexington?

A. General Foreman at Ashland.

Q. Of what?

A. Of the shops.

Q. The Company has shops at Ashland, Huntington and Lexington?

A. Yes, sir.

Q. You were general Foreman of the shops at Ashland how long?

A. About five years.

Q. And before you were Foreman of the shops at Ashland what position did you hold with the Company?

A. I was Round-House Foreman at Lexington.

Q. What were your duties?

A. To see that all engines were in proper condition and saw to the overhauling of them.

Q. Then you have been also before becoming Roundhouse Foreman or shop Foreman you were in the Mechanical department as machinist?

A. Yes, sir.

206 Q. You have gone from the bottom to the position in the mechanical department which you now hold?

A. Yes, sir.

Q. During your service in the mechanical department of the Railway Company have you been familiar with the construction of locomotives and the various types?

A. Yes, sir.

Q. Did you know engine 143?

A. Yes, sir.

Q. She had what you call a center bearing truck?

A. Yes, sir.

Q. What do you mean by a center bearing truck?

A. You have the bearing in the center of the truck.

Q. What do you mean by the bearing?

A. I mean the weight of the engine.

Q. Is that model an illustration of the sort of truck that engine 143 had?

A. Yes, sir.

Q. This model came from the Huntington shops?

A. Yes, sir.

Q. It is not a model of any particular engine?

A. No, sir.

Q. What fits into that casting on that center plate?

A. A male center casting.

Q. Now what sort of front drivers did 143 have?

A. The front driver was ball driver.

Q. An engine having a rigid truck with that kind of a solid plate, or what is called the rigid bars, will it go round curve easier with the front driving wheels ball drivers or flange wheels?

A. It will go round easier with the ball driver in front.

Q. Is it or not a fact that with a flange on the front driving wheel it makes an entire rigid wheel base for the locomotive?

A. Yes, sir.

Q. Speaking in the light of your experience in the mechanical part of the Railway Company and your knowledge of the construction of locomotive engines and the use to which they are put, to the jury whether in your opinion and judgment an engine of the sort of truck that 143 had and which is illustrated by the model now in the presence of the jury, with the front driving wheels with ball drivers, is it not a safe method of construction?

A. Yes, sir, I think so, I would say it was safe. With the ball driver you couldn't use anything else but that kind of a truck.

Q. It is a fact that with the swinging center plate you can't use a ball driver at all?

A. No, sir.

Q. Mr. Robinson did engine 143 go into the shops at Ashland for overhauling before this accident?

A. Yes, sir.

Q. What time did she go in?

A. I think it was about the 3rd of March.

Q. Was that at Ashland or Huntington?

A. At Ashland.

Q. Was the overhauling done under your supervision?

A. Yes, sir.

Q. When was she taken out of the shops?

A. On the 28th day of March.

Q. What was her condition?

A. Good.

Q. Do you know what division engine 143 is operating on now?

A. I would not say for certain, but think on the Cincinnati Division.

Cross-examined:

Q. When you overhauled engine 143 some months before did you put any flange on that front driver?

A. No, sir.

Q. You didn't change that rigid truck either?

A. No, sir.

Q. What was the matter with her when you overhauled her?

A. I didn't think she was tracking and I thought the engine frame was broken.

Q. That frame you mention what did you do with that?

A. I didn't use it.

Q. You could not put in a new frame at that shop?

A. No, sir.

209 Q. Could you put on a flange at that shop?

A. Yes, sir.

Q. You mean to say that that is the only kind of a truck that you could have used under an engine having a front driver?

A. No, sir, you can use the arch bar truck.

Q. Now as a matter of fact, has the Chesapeake & Ohio Railway Company been buying in the last twenty years any engine with a front ball driver and that kind of a truck?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They have not been buying any engines with the ball driver.

Q. Or that kind of a truck?

A. No, sir.

Q. In modern construction are they not using the swinging center plate and a flange on their front driving wheels?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. How many times to your knowledge was engine 143 in the ditch?

(The foregoing question objected to, which objection the Court sustained.)

By the Court: You may ask him if he knows about it.

Q. Was she in the ditch?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

210 A. Well to my knowledge I will say twice.

Q. Do you know a gentleman who is an official in your Company by the name of Fox?

A. Yes, sir.

Q. What are his initials?

A. J. A. Fox.

Q. What is his office?

A. Superintendent.

Q. Is he over all you men, engineers and everybody?

A. He is supposed to be.

Q. You know him personally?

A. Yes, sir.

Q. Is he here today?

A. Yes, sir.

- Q. Have you seen him lately?
A. Yes, sir.
Q. Is he in the Court room?
A. Yes, sir.

The next witness introduced on behalf of the defendant was J. L. WILLIAMSON, who first being duly sworn testified as follows, to-wit:

- Q. Your name is J. L. Williamson?
A. Yes, sir.
Q. You are a locomotive engineer in the employ of the Chesapeake & Ohio Railway Company.
A. Yes, sir.
Q. By whom were you summoned as a witness in this case?
A. By Mr. Williams.
Q. Were you summoned for the plaintiff?
A. Yes, sir.
Q. You were summoned as a witness for the plaintiff?
A. Yes, sir.
Q. Were you discharged as a witness by them without examination?
A. Yes, sir.
Q. How long have you been an engineer in the service of the company?
A. Twenty-six years.
Q. It is a fact that you testified as witness for the plaintiff in the trial?
A. Yes, sir.
Q. You have been an engineer twenty-six years?
A. Yes, sir.
Q. What were you before?
A. Fireman.
Q. How long has your total service with the Chesapeake & Ohio been?
A. Thirty-one years.
Q. Where is your run now?
A. From Ashland to Lexington and from Lexington to Mt. Sterling.
Q. Did you know engine 143?
A. Yes, sir.
Q. Did you ever run that engine yourself?
A. Yes, sir.
Q. Where?
A. On the Lexington Division, the same run I am on now.
Q. Did you ever run this track where the accident occurred?
Mr. Kelly?
A. Yes, sir.
Q. Were you running an engine at that time before Mr. Kelly's death?
A. Yes, sir.
Q. On this same division?
A. Yes, sir.

Q. What sort of train were you running?

A. A passenger.

Q. Did you ever use engine 142?

A. Yes, sir.

Q. Did you ever run opposite to 143? On the opposite run to 143?

A. Yes, sir, my run was the opposite run from Mr. Kelly.

Q. Were there any other passenger engineers running between Ashland and Mt. Sterling or Lexington at that time except you and Mr. Kelly?

A. We were the regular men on these trains.

Q. Where does your run begin in the morning?

A. One day out of here and the next day out of Ashland.

Q. You run from Mt. Sterling to Lexington and back to Ashland?

A. Yes, sir.

Q. And then the next day you run from Ashland to Lexington and back to Mt. Sterling?

A. Yes, sir.

213 Q. And the train that runs opposite to you makes the same run as that on alternate days?

A. Yes, sir.

Q. What was the schedule over this track from Aden to Leon at the time of Mr. Kelly's death.

A. I don't know exactly. I don't think the schedule time has ever been under ten minutes, and believe it is eleven minutes at the present time.

Q. Do you remember what it was at that time?

A. Ten or eleven minutes.

Q. What is the distance from Aden to Leon?

A. Between four and five miles—about 4.3 miles.

Q. Do you know the construction of engine 143 and also engine 142 as respects the front drivers and as respects the kind of truck that was used on each engine?

A. Yes, sir.

Q. What sort of truck did those engines have?

A. They had what we call a rigid truck. It is my understanding they call it a rigid truck simply to identify it from another truck of a different kind.

Q. That is the swinging truck.

A. Yes, sir. I don't know whether that is an absolute rigid truck or not.

Q. It is a center bearing truck?

A. Yes, sir.

214 Q. In how many forms or types are those rigid trucks constructed?

A. I have never seen but two.

Q. Is that one of them on the floor?

A. Yes, sir.

Q. What is the other kind?

A. The arch bar truck.

Q. In your judgment is there any more flexibility about the arch bar rigid truck than this complete rigid truck?

A. Yes, sir, I believe the rigid bar truck is a little bit more flexible.

Q. For what reason?

A. There is more spring to it and more bolts in it.

Q. Anything in your judgment that has a greater number of bolts about it will render more room for play?

A. It depends on how they are located.

Q. You say it is more flexible on account of the bolts?

A. Yes, sir.

Q. How much more do you think it would give lateral than that sort? (Indicating.)

A. I don't know as any more.

Q. You mean it is a little flexible up and down?

A. Yes, sir.

Q. In its motion sideways it would not make any difference?

A. No, sir.

215 Q. Did you run this engine 143 in June, 1910?

A. I won't be positive about the date, it is here in the record somewhere. I had it with me here before.

Q. Did you have any trouble with her on that particular run in June, 1910?

A. I didn't have any trouble with her, no, sir.

Q. Well, did you make any complaint in connection with her?

A. Yes, sir.

Q. Why?

A. I run her under protest because she was not tracking and had no flange on the front driver.

Q. And with an engine that was not tracking was it your idea that she was safer with the flange than without it?

A. Yes, sir.

Q. Did you take her out on that trip?

A. Yes, sir.

Q. You had no trouble on that trip?

A. No, sir. I run her slowly and carefully around the curves.

Q. Now did you notice whether she was tracking or not tracking on that trip?

A. She was not tracking.

Q. That fact was reported to you?

A. Yes, sir.

Q. When did you run that engine again after that?

A. About a month later, I think, I am not positive.

Q. Where was it that you reported her condition as not tracking in June?

216 A. In Ashland and Lexington both.

Q. Were they equipped at both those places to make the repair, to remove that trouble?

A. Yes, sir, at either place.

Q. Did the fact that she didn't have a flange on her front driver have anything to do with her not tracking?

A. No, sir.

Q. When you took her out the next time, a month after that, what did you find as to whether or not that condition of not tracking had been removed?

A. She was all right.

Q. Now in running engines of the type of 142 and 143 did you ever have any trouble with them or either of them?

A. No, sir, never had any trouble more than I have mentioned.

Q. Did the matter of the truck or the ball driver either have anything to do with that trouble of not tracking?

A. No, sir.

Q. What is it due to?

A. One side of the engine being longer or shorter than the other side.

Q. The driving wheels in a condition of that sort are not properly aligned and need to be re-aligned?

A. Yes, sir.

Q. Is that a thing that is easily remedied or not?

A. That is a matter with the shop men, I can't say how long it would take them to do it.

Q. Is that failure to track properly a thing you run across every now and then with engines?

A. Yes, sir, I have seen it right frequently.

217 Q. How long did you run engine 143?

A. Several months.

Q. How did she compare with other engines?

A. When I run 143 she had just been overhauled and I thought a great deal of her.

Q. Have you been in the habit of running engines with ball drivers during your years of service?

A. Yes, sir.

Q. Often or seldom?

A. A good many years, ever since I have been here.

Q. Did you ever have any trouble with the ball driver?

A. No, sir, nothing that I know of that was due to that fact.

Q. Did you ever have any trouble with the truck of that construction? (Indicating.)

A. No, sir.

Cross-examined by E. C. O'Rear, of counsel for plaintiff:

Q. Haven't you been asking Mr. Williams here a number of times to examine you in this case and let you go home; that you wanted to go East to-day on the 12:37 train?

A. I sent word to him that I would like to go.

Q. Didn't you ask him to examine you so you could get away?

A. I told him I would like for him to get through with me. He understood that I was here to testify.

218 Q. He also understood that you were very anxious to get away?

A. Yes, sir.

Q. You told him so half a dozen times?

A. Yes, sir.

Q. You say you call that a rigid truck? (Indicating.)

A. Yes, sir.

Q. And this is too, isn't it? (Indicating.)

A. I can't say as to that.

Q. I am talking about this model.

A. I was going to explain—There was a truck that was termed a rigid truck before my time that was different to this; they call this a rigid truck, as I understand, to distinguish the difference between this kind of a truck and the swinging truck.

Q. Would you know how to make that (indicating) any more rigid than it is?

A. No, sir, don't know as I would.

Q. I believe you stated that you protested against taking engine
143 out on one occasion?

A. Yes, sir.

Q. Did you make a written protest?

A. Yes, sir.

Q. To whom?

A. To George W. Robertson.

219 Q. The gentleman who has testified?

A. Yes, sir.

Q. The Master Mechanic now?

A. Yes, sir.

Q. Did you tell anybody else about that protest?

A. Yes, sir.

Q. Who?

A. E. A. Merritt.

Q. Who is he?

A. Master Mechanic at Lexington?

Q. Was he at Ashland at the same time you told Robinson?

A. No, sir.

Q. Where was Robinson when you told him?

A. In Ashland.

Q. Did you tell anybody else?

A. I don't know who all I told. I believe I told Mr. Williams and Mr. Kelly both about it the night I got in Mt. Sterling.

Q. Do you remember of telling Mr. Williams about a letter you wrote your wife in regard to taking that engine out on protest?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir, I don't.

Q. Do you remember of showing Theo. Robinson that written statement or letter?

A. Yes, sir.

220 Q. You know him?

A. Yes, sir.

Q. What does he do?

A. He fires for me.

Q. What did you take that engine out for?

A. I thought it was my duty; I wasn't going to hurt anybody, I told them I wasn't going to hurt anybody.

Q. What did they say then?

A. Said take her anyhow.

Q. You had to take her or take a walk?

A. I don't know what the officials would have done if I had refused.

Q. You were not going to take any chances on it?

(The foregoing question objected to, which objection the Court sustained.)

Q. At that time when you made that complaint if they had had a flange on that engine it would have been safer, would it not?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Under the circumstances, it would sure.

Q. And if it had a flange on it when Mr. Kelly was killed it would have been safer?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. I don't know anything about that; that was a year after.

221 Q. I know, but if it had a flange on that ball driver at that time it would have been a safer engine, would it not?

A. I don't know.

Q. Don't you know when the trucks reach the rail if there are flanges on the front driver if the engine isn't more apt to stick to the track than if it had no flange?

A. I don't know, but it would suit me better. I would feel better.

Q. Don't you know it would be safer?

A. I cannot say. I will say this much—I would rather the flange would be there.

Q. Now I want your opinion as a matter of experience—I will ask you if in your opinion that would not have been safer with a flange on that driver?

A. I think it is.

(Re-examined:)

Q. That protest that Judge O'Rear was asking about in such solemn tones—what was the cause of that protest?

A. Because the engine wasn't tracking and it had no flange on the front driver.

Q. If that had been tracking would you have made any protest against taking that engine out?

A. No, sir.

Q. Would you have considered it unsafe?

A. No, sir.

Q. Do you consider an engine with ball drivers and that sort of a truck an unsafe method of construction?

A. Not if tracking at all.

222 Q. After this engine had killed Matt Kelly didn't you refuse to take her out?

A. No, sir.

Q. Who took her out?

A. I think John Kelly did.

Q. And didn't John Kelly take her out because you refused to ride her?

A. No, sir.

Q. Didn't you tell John Kelly to run her slow and be careful and not make the schedule time?

(The foregoing question objected to, which objection the Court sustained.)

223 The next witness introduced on behalf of the defendant was E. A. WADKINS, who first being duly sworn testified as follows:

Q. Your name is E. A. Wadkins?

A. Yes, sir.

Q. Where is your home?

A. Ashland, Kentucky.

Q. How long have you been in the Railway service of the Chesapeake & Ohio Railway?

A. About thirty years.

Q. What did you commence at?

A. Locomotive fireman.

Q. And you then became an engineer?

A. Yes, sir.

Q. And what was your position after serving as engineer?

A. I was appointed Road Foreman of engines.

Q. That is a position of promotion?

A. Yes, sir.

Q. What is the duty of Road Foreman of engines?

A. I have supervision over the engineer-, fireman and engines.

Q. How do you discharge that duty of supervision, does it call you out on the road?

A. Some of — duty is to ride the engines and if there is any trouble recommend the remedies.

Q. You also look after the engineers?

A. Yes, sir, and firemen and see if they discharge their duty properly.

224 Q. You employ the firemen and engineers, do you not?

A. Yes, sir.

Q. How many years have you been occupying the position of Road Foreman of engines?

A. A little over six years.

Q. Your practical experience as engineer extended from what period of time?

A. Twenty years.

Q. Were you riding on engine 143 on June 28, 1911, at the time of the accident which we now have under investigation?

A. Yes, sir.

Q. Where did you get on the engine just prior to the accident?

A. I believe it is called Mountain Top.

Q. How far is that west of Aden?

A. About three miles.

Q. In your ride from Mountain Top to Aden how was the engine doing?

A. As far as I could see, all right.

Q. Had you ever run engine 143 yourself?

A. Yes, sir.

Q. How often?

A. I could not state that, I don't know.

Q. You were familiar with her?

A. Yes, sir. I run an engine of the same type for three months—
374.

225 Q. In re-numbering what number was given to that engine?

A. She is 142 now.

Q. She is of the same type, built at the same time and received at the same time as engine 143?

A. Yes, sir.

Q. And you have run both that engine and 143?

A. Yes, sir.

Q. State to the jury from your practical experience as an engineer whether you consider that a safe type of engine?

A. Yes, sir, as far as I knew anything about her she was safe if she hadn't been I would have been afraid of her.

Q. Were you on this engine at the time she went over?

A. I think I was.

Q. It is a fact you were on her when she left Aden?

A. Yes, sir.

Q. State to the jury whether you recall anything at all after you left Aden?

A. I can't recall anything except after leaving Aden I recognized the fireman's voice and asked him what was the trouble and he said the engine had jumped the track and turned over.

Q. You have no recollection between Aden and the curve on which the engine went over?

A. No, sir.

Q. It is a fact you were very seriously injured?

A. I was unconscious from the time of the accident until the next morning. I don't consider that I was seriously injured.

Q. You had a broken leg?

226 A. Yes, sir.

Q. You were disabled how long?

A. For about sixteen months.

Q. You were unconscious at the time the engine turned over except you remember hearing the voice of the fireman?

A. Yes, sir.

Q. Then do you remember anything else after he told you the engine had gone over?

A. Not until I reached Lexington.

Q. You had known Mr. Kelly for a long time?

A. Yes, sir.

Q. Do you know how often Mr. Kelly had run this engine 143?

No, sir. I think he had been on her probably five or six months. I think he was on her from January up to the time of the accident?

Q. Was Mr. Kelly aware of the fact that that engine had ball drivers?

A. Yes, sir.

Q. Was he aware of the fact that she had that type of truck construction?

A. Yes, sir.

Q. And he had been running her for six months?

A. Yes, sir.

Q. It was Mr. Kelly's duty to know that, wasn't it?

A. Yes, sir.

227 (Cross-examined:)

Q. You don't know what Mr. Kelly knew about that engine, do you?

A. Well, I suppose——

Q. The question I am putting to you is, do you know whether Mr. Kelly knew that you knew that engine had a ball driver and a rigid truck?

A. I don't know that.

Q. Do you know whether he knew that you thought as his superior officer that was a safe type of engine for him to run on that road?

A. I don't know.

Q. Do you know whether he knew that Mr. Fox, his superintendent, insisted that that was a safe type of engine to run on that road?

(The foregoing question objected to, which objection the Court sustained.)

Q. Had you been on that engine before on that day—I mean on that trip?

A. Yes, sir.

Q. Where?

A. I got on at Lexington.

Q. How far did you go?

A. I went to Midland.

Q. Was anything the matter with her then?

A. She was not steaming good.

Q. What was the matter?

228 A. Partly on account of the fireman.

Q. What else?

A. Due to the draft appliances in the front end not working right.

Q. Out of fix?

A. Well, the steam pipe was leaking.

Q. You say you got on again about Aden?

A. About three miles west of Aden?

Q. And how far do you remember to have stayed on there?

A. A short distance the other side of Aden.

Q. Do you know where this wreck occurred?

A. Yes, sir.

Q. How near to that point was it that you remember of being on the engine?

A. About a mile.

Q. Who else was on the engine?

A. The fireman, Mr. Stump.

Q. Do you know how you got off that engine?

A. No, sir.

Q. Did Stump get off before you did?

A. I don't know.

Q. Was Stump injured in that accident?

A. He said he was.

Q. Did he have any injury that you could see?

A. No, sir.

Q. Mr. Kelly is the only man that stayed on the engine as far as you know?

A. I don't know that he stayed on.

229 Q. You said you knew Mr. Kelly. He was a careful, competent engineer, wasn't he?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Wasn't he running that engine right that day?

A. Yes, sir, as far as I knew he was.

Q. You know, don't you?

A. Yes, sir.

Q. He was running it right?

A. Yes, sir.

(Re-examined:)

Q. This steaming had nothing to do with the safety of the train?

A. Nothing in the world.

Q. That just affected the pipes in the front of the locomotive?

A. Yes, sir.

Q. Had you been riding that engine before you got on at Mountain Top?

A. Yes, sir.

Q. Where?

A. I rode her from Lexington to Midland.

Q. Can you recall the immediate occasion of you making that trip on that engine that day?

A. Yes, sir.

Q. What was it?

230 A. The day before in Ashland Mr. Kelly asked me to ride the engine to ascertain what the trouble was, she wasn't steaming.

Q. Tell why you were riding it?

(The foregoing question objected to, which objection the Court sustained.)

Q. Had complaint been made that Mr. Kelly was violating the speed rule?

(The foregoing question objected to, which objection the Court sustained, to which defendant excepts.)

By the Court: He may tell why he was there but not to detail the conversations.

The defendant thereupon offered to prove by the witness that the particular reason why he was upon the engine on said occasion was that complaint had been made that Mr. Kelly was violating the speed rules at curves, and it was the witness' duty to ascertain if this was the fact. Plaintiff objected to said testimony being introduced and the Court refused to permit the witness to prove such fact, to which the defendant excepted.

Q. Had you any particular object in view or any particular purpose when you got upon the engine on that day with Mr. Kelly at Mountain Top?

A. Yes, sir.

Q. Now without telling what anybody said to you or any complaint made to you, tell what your object was in getting on the engine at Mountain Top?

(The foregoing question objected to, which objection the Court overruled.)

231 A. I got on for the purpose to see whether he handled his train properly between there and Aden.

Q. Was that curve where the engine went off the first curve after you left Aden?

A. That was the second curve.

Q. What sort of curve is the first one after you leave Aden?

A. It's a sharp curve.

Q. You have no recollection of what occurred after leaving Aden?

A. No, sir.

Q. Don't know how you got off the engine?

A. No, sir.

Q. Don't know how he got off?

A. No, sir.

Q. You don't know anything that happened for three or four hundred yards the other side of Aden?

A. No, sir.

Q. Do you know anything about the derailment of 143 that occurred at Leon Tunnel about a year ago?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Were you on that engine?

A. Yes, sir.

232 Q. Who was running it?

A. Engineer Ware.

Q. What was the cause of that derailment?

A. I could not say.

Q. Did you make an examination at the time?

A. Yes, sir, I made an examination of the track and the engine.

Q. Was anything the matter with that track?

A. There was a rail that was a little worn.

Q. Was it worn as much as that? (Indicating.)

A. No, sir.

Q. Was that the only trouble you could find?

A. Yes, sir.

Q. It was your business to find out the trouble?

A. Yes, sir.

Q. And you looked for that purpose?

A. Yes, sir.

Q. It is also your business to report the cause of that derailment?

A. Yes, sir.

Q. Did you do it?

A. No, sir.

Q. Mr. Wadkins the Chesapeake & Ohio Railway Company haven't been getting any of these ball drivers and rigid truck engines for the last twenty years, have they?

(The foregoing question objected to, which objection the Court sustained.)

Q. I will ask you if in the last twenty years the Chesapeake & Ohio Railway Company have been buying any engines at all?

233 (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. Yes, sir.

Q. Many or few?

A. A good many.

Q. Have they bought any with the ball drivers and the rigid truck in that time?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. They have bought a good many of the ball drivers.

Q. Did you understand my question?

A. I don't know as they have bought any engines of that exact type.

Q. Don't you know they haven't?

A. No, sir.

Q. You testified in this case before?

A. Yes, sir.

Q. Is your memory good?

A. Yes, sir.

Q. How many ball drivers have they bought in the last twenty years?

A. I could not say.

Q. Have they bought but one?

A. They have bought more than one.

Q. I will ask you if on your previous examination as a witness here last April this question was not asked you—"Isn't it a fact that the Chesapeake & Ohio Railway have never since they got these three engines of this particular type had another engine of that same type?" and you answered—"I have never seen any."

A. I have just seen those three in that particular type.

234 Q. Then this question was asked—"Isn't it a fact that the new engines that they have gotten don't have the ball driver?" And you answered—"They have a good many ball drivers." Then the question—"Didn't they have flanges on them?" And you answered, "Not all of them." Then the question, "How many of them have the ball drivers?" and you answered, "I can't recall but one just now."

A. That is, in this Division.

Q. Did you say anything about this Division in your answers?

A. No, sir.

Q. Do you know of any engine with the ball driver that has been put on this division in the last twenty years?

A. Yes, sir.

Q. Where is it?

A. It runs on the K. & S. A. Branch.

Q. How long have they used it?

A. Over twenty years.

Q. Well, I am asking you within the last twenty years?

A. Yes, sir.

Q. Where did you see it?

A. In Lexington.

Q. What was it doing?

A. Had been used on passenger trains and work trains some.

Q. She has been taken out of the service, hasn't she?

A. I think since this last trial.

Q. Not on this division now?

A. No, sir.

235 (Re-re-ex.:)

Q. Have they in recent years been buying any engines as light as 143?

A. No, sir, not to my knowledge.

Q. The weight of engines has greatly increased in the last year?

A. Yes, sir.

Q. And with the increase in weight different styles of construction have been adopted?

A. Yes, sir.

Q. Isn't it a fact that the engines that are being used in the fast passenger service now have a shorter wheel base?

A. Yes, sir, some.

Q. That is the rigid wheel base?

A. Yes, sir.

Q. What do you mean by the rigid wheel base?

A. That means the number of drive wheels that have flanges on them.

Q. And they have been shortened?

A. Yes, sir.

Q. You say you examined the condition at Leon to ascertain if you could what caused the derailment at the Leon Tunnel?

A. Yes, sir.

Q. Did you find any condition there that accounted for it, in your judgment?

A. No, sir.

236 A. No, sir.

Q. Do you think the wearing of the rail was sufficient to have caused the derailment there?

A. No, sir.

The next witness introduced on behalf of the defendant was ERNEST MONTAGUE, who first being duly sworn testified as follows:

Q. You live in Ashland, Mr. Montague?

A. Yes, sir.

Q. You are an employ- of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. How long have you been in their employ?

A. For about ten years.

Q. What is your business with the Chesapeake & Ohio Railway Company?

A. I am accountant in the Superintendent's office.

Q. How long have you held the position as accountant?

A. Four or five years.

Q. Are there any records kept in the superintendent's office by which you show the mileage made by the various engines of this Company?

A. Yes, sir.

Q. The Ashland Division extends where?

A. It embraces the Big Sandy, Lexington and Louisville Divisions.

237 Q. Do you keep those accounts yourself?

A. Yes, sir, the greater part of them.

Q. They are kept under your supervision?

A. Yes, sir.

Q. And what sort of a thing are they kept in?

A. They are kept in a regular mileage book.

Q. Have you the mileage book with you?

A. Yes, sir.

Q. Did you make an examination of the mileage books with a view of testifying in this case?

A. Yes, sir.

Q. Do you know where engine 143 was prior to January 1907?

A. I do not.

Q. Have you a record in the books of which you speak showing the mileage made by the engine from January 1907 up to the date of this accident?

A. I have with the exception of one month, March, 1907.

Q. Leaving out that month, what was the mileage made by engine 143 during that period from January?

A. The books show the mileage to be 26042 miles.

Q. Have you that set out — month?

A. Yes, sir.

Q. I will be glad if you will read that, month by month, beginning with January 1907.

(The foregoing question objected to, which objection the Court sustained for the time being, to which ruling of the Court defendant excepts.)

38 Q. This record from which this memorandum is made is kept up by you from what?

A. The engineers' books.

Q. And after the entry is made in the book what is done with the engineers' books?

A. They are preserved for a while.

Q. And then what?

A. Then they are destroyed.

Q. Those engineers' books would correspond to a blotter in book-keeping?

A. Yes, sir.

By Mr. Shelby: We submit that is a book of original entry.

By the Court: Yes, he may answer the question.

Engine 143.	Lex.	Lou.
Jan'y 1907	332	3495
Feb'y 1907	137	4439
March 1907		
April 1907	38	4865
May 1907	216	4931
June 1907		3500
July 1907		
August 1907		
September 1907	1075	4092
October 1907	3162	170
November 1907	2978	
December 1907	3289	
Jan'y 1908	1518	
Feb'y 1908	2666	
March 1908	1527	
April 1908	2656	
May 1908	3477	173
June 1908	3060	344

Engine 143.		Lex.	Lou.		
July	1908	2551			
August	1908	1473			
September	1908	2157			
October	1908	357	1638		
November	1908	1475	3968		
December	1908	761	7328		
239					
Jan'y	1909				
Feb'y	1909	1110	518		
March	1909	1137	864		
April	1909	393	170		
May	1909	2462			
June	1909	1151	172		
July	1909				
August	1909				
September	1909				
October	1909				
November	1909	2404	173		32
December	1909	1128	690		
45883		133	20		
36550		148	105		
32		98	85		
34100		45	36		
1729					
7100					
638					
126032					
January	1910	544	523	448	44
February	1910	1281	171	398	22
March	1910	805		440	
April	1910	966			
May	1910	659	345		47
June	1910	2408		150	
July	1910	4048			
August	1910	2959	173	250	29
September	1910	414	172	1647	150
October	1910	1644		988	127
November	1910	1012	172	982	74
December	1910	926		1648	133
January	1911	3289			
February	1911	2656			
March	1911	47		149	12
April	1911	3151			
May	1911	3887	173		
June	1911	3404			
	100			50	38
	80			19	33
	91			42	6
	34			17	

240 (Cross-examined:)

Q. You say that engine run 126,032 miles in that time?

A. Yes, sir, with the exception of March.

Q. Do you know what effect the running had on it; that is as to the wearing of it?

A. I did not.

Q. Did you bring any book here showing how many times she had been in the ditch?

A. No, sir.

Q. Did you bring any book here showing how many times she had been in the shop?

A. No, sir, I didn't keep any record of that.

Q. Does the Company keep any records of that kind?

A. I presume they do.

Q. Do you know where they are?

A. No, sir.

Q. They do keep such records? Now I am talking about whether or not the Company keeps the records of the times the engines are in the shops for repairs?

(The foregoing question objected to, which objection the Court overruled, to which ruling of the court defendant excepts.)

A. I am not sure, but think they do.

Q. Do you know whether the Company keeps records of the number of accidents that happen to locomotives whether they are in the shop or smokestack?

A. I think they do.

241 Q. Mr. Montague did you ever see any of these records I am asking you about?

A. No, sir, never did.

Q. You have information that there are such records?

(The foregoing question objected to, which objection the Court sustained.)

The next witness introduced on behalf of the defendant was H. G. HOFFMAN, who first being duly sworn testified as follows:

Q. Your name is H. G. Hoffman?

A. Yes, sir.

Q. Where do you live?

A. At Mt. Sterling.

Q. What is your business?

A. I am in the insurance business.

Q. How much experience have you had in the Life insurance business?

A. Twenty-five years..

Q. Have you had any experience in the accident insurance?

A. Yes, sir.

Q. What company do you now represent in the life insurance business?

- A. The State Mutual of Massachusetts.
- 242 Q. Does that Company insure locomotive engineers?
A. No, sir.
- Q. Do you know whether they are insured or not?
A. Yes, sir, some companies insure them but don't know just what they are now.
- Q. In any of the old line insurance companies.
A. Yes, sir, I think the New York life and perhaps the Equitable.
- Q. Do you know how that kind of a risk is classed as compared with the ordinary risks?
A. Well, if they are written at all it is at a higher rate.
- Q. Do you know how much higher?
A. No, sir, I don't.
- Q. Do you know whether the rate is fixed according to the actual age of the party desiring the insurance or whether or not it is fixed at a higher rate?
A. It is written at the same rate that would be charged any one else for the same policy and then an additional premium is charged for the hazardous occupation.
- Q. What I mean is this—Suppose a man was forty years old and following an ordinary avocation and if a railroad engineer, in order to ascertain the premium he would be required to pay, would they arrive at that by fixing the rate premium at a more advanced age than he actually was?
A. In some instances they charge an extra premium to cover the hazard and in other instances they rate this man at fifty years perhaps when he was only forty-eight.
- 243 Q. In accident insurance is there any difference between insuring the locomotive engineer and a person of ordinary avocation?
A. Yes, sir, decidedly.
- Q. Tell the jury what the difference is?
A. Well basing it upon a fifteen hundred dollar policy, the premium for a man of ordinary avocation would be five dollars a year against death and five dollars a week indemnity; while an engineer would be one thousand dollars against death, five dollars a week indemnity and the premium would be twenty-two dollars.

Cross-examined.

- Q. Do you insure a man sixty years old in your Company?
A. Yes, sir.
- Q. Sixty-five?
A. Yes, sir.
- Q. Do you insure them any age?
A. No, sir, that is the limit.
- Q. How young do you insure them?
A. Sixteen.
- Q. You would not insure them at fifteen?
A. Very likely I would if I needed the money.

Q. Would you put the engineers through if you needed the money?

A. No, sir.

244 Q. What about further south?

A. I have never been down there.

Q. I am talking about the rules of your Company now?

A. I don't believe anything is said as to residence and occupation.

Q. Don't you know there is a stipulation in the policy——

A. No, sir, they ask the question if you are thinking of changing your occupation and residence and they investigate that at the time.

Q. You don't mean to say that no companies insure engineers?

A. No, sir, the New York Life and the Equitable do.

Q. They are both good companies.

A. Perfectly, yes, sir.

Q. Mr. Hoffman you would not insure a man in military service, would you?

A. No, sir.

Q. Nor in the Navy service?

A. Yes, sir.

Q. Do you insure seamen?

A. I think so; the rules don't say anything about them.

Q. The rules are different in different companies, are they not?

A. Yes, sir.

Q. They have an arbitrary arrangement of their own?

A. Yes, sir.

245 The next witness introduced on behalf of the defendant was W. P. HOBSON, who first being duly sworn testified as follows:

Q. Your name is W. P. Hobson?

A. Yes, sir.

Q. And you are — present the Master Mechanic of the Cincinnati Division?

A. Yes, sir.

Q. Of the Chesapeake & Ohio Railway?

A. Yes, sir.

Q. What does your jurisdiction extend over?

A. From Cincinnati to Russell, Kentucky.

Q. How long have you been on that division?

A. Just about a year the last time.

Q. And you are Master Mechanic at Covington now?

A. Yes, sir.

Q. Before you became Master Mechanic at Covington what was your position with the Company?

A. I was Master Mechanic at Ashland.

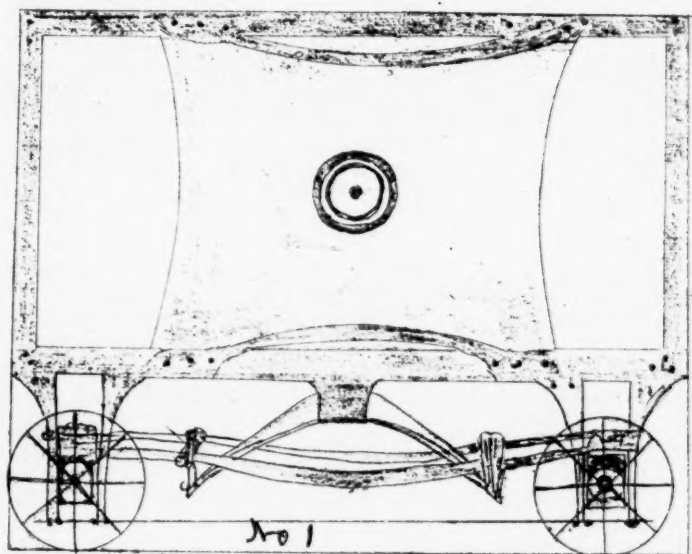
Q. That includes what?

A. From Ashland to Louisville and the Big Sandy.

Q. Your headquarters were at Lexington?

A. Yes, sir.

- Q. How long did you have that position?
A. Five or six years.
Q. Before that what position did you hold?
A. I was Assistant Master Mechanic at Hinton, West Virginia.
- 246 Q. How long have you been in the various grades of the Mechanical department of the railroad service?
A. Twenty-eight years the first of this month.
Q. You started in the Huntington shops?
A. Yes, sir, as an apprentice.
Q. And have gone through the various departments of the work up to where you are now?
A. Yes, sir.
Q. Did you know engine 143?
A. Very well, yes, sir.
Q. What sort of front drivers did she have?
A. She had a ball driver in front prior to a year ago.
Q. A ball driver you say?
A. Yes, sir.
Q. And what sort of a truck did she have?
A. A four wheel engine truck.
Q. Was it a swinging truck?
A. It wasn't a swinging truck or a rigid truck either.
Q. What would you call it?
A. I don't know just what you would term it.
Q. Is it a center bearing truck?
A. Yes, sir.
Q. I believe the swinging trucks are center bearing too?
A. Yes, sir.
Q. It is a fact that technically speaking the term, rigid truck, relates to a style of construction some years back?
A. I never saw one.
Q. Now this is the type of truck that engine 143 had which is represented by this model here?
A. Yes, sir, it looks like the identical truck.
Q. As far as the truck herself was concerned that was the construction?
A. Yes, sir, springs and everything.
- 247 Q. Now that is a solid casting (indicating) is it not?
A. Yes, sir.
Q. How thick was the casting that was in actual use on the engine itself?
A. I could not tell you, between an inch and an inch and a half.
Q. Was it thicker than that? (indicating)
A. Yes, sir.
Q. Now is there another type of non-swinging center plates?
A. Yes, sir.
Q. What do you call that?
A. Well it is a center bearing truck without the cradle arrangement.



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Q. What is it built on? What does it have in place of that solid bar you see in that model?

A. Well, it is of equalizers, and has pieces of iron that are placed across each end. It is called the arch bar construction.

Q. Now that arch bar truck is not what you call a swinging truck?

A. No, sir.

Q. Is that arch bar truck any more flexible than this pattern with the solid plate?

A. No, sir.

Q. What is the size of these bars?

A. About four inches wide and an inch thick.

Q. Now do those arch bar trucks in their construction admit or not of any lateral motion of the truck like the swinging truck itself?

A. No, sir, all the lateral they have is in the boxes.

Q. And that is the same amount this solid plate has?

A. Yes, sir.

Q. As far as rigidity is concerned what, if any, is the difference between that solid plate and the rigid plate?

248 A. None at all.

Q. Through how many different things is the weight of the engine transmitted in a truck of that pattern before it gets to the rail?

A. About six.

Q. What are they?

A. The weight goes on that center plate, then on to the equalizers, on to the springs, the spring hangers, on to the engine truck boxes, then to the journal and from the journal to the rail.

Q. Mr. Hobson I believe you made for the purpose of illustration a diagram at the last trial?

A. I did.

Q. Does this diagram (Indicating) — the process of transmission of the weight of the engine from the center plate here down to the rail and the various things through which it goes?

A. Yes, sir.

Q. We will call that drawing No. 1. Will you file that drawing as a part of your testimony marked "Hobson No. 1?"

A. I will.

(Here follows sketch marked page 248a.)

Q. What is the object in having the weight transmitted through so many different parts from the center plate to the rail?

A. It is to support the engine and have a spring to the engine so it will not be rigid.

Q. That does away with the rigidity of it? It makes it less rigid than if it was immediately transmitted from the body itself to the rail?

A. Yes, sir.

Q. How long have you known the type of engine to which 143 belonged? That is, with that kind of truck and with the ball drivers?

A. Fifteen or eighteen years.

Q. Is it in use on other roads besides the Chesapeake & Ohio?

249 A. Yes, sir.

Q. I will get you to state to the jury your opinion as a mechanic as to the safety of that type of engine, is it a safe or an unsafe engine?

A. I think it is safe; I know of no improvement you could make on the engine or the truck.

Q. When you were at Hinton, West Virginia, during any of that time you were there, was 143 running under your jurisdiction at that time?

A. Yes, sir, three of those engines were.

Q. What were their numbers?

A. 141-142-143.

Q. Did you ever know of a derailment of any of them between Hinton and Clifton Forge?

A. These engines run on the fast trains between Hinton and Clifton Forge for several years and I can't recall a derailment.

Q. What were the trains that these engines were pulling?

A. One, two, three and four.

Q. Is it or not a fact that that road runs through the most mountainous regions of the Chesapeake & Ohio Road?

A. Yes, sir.

Q. How are the curves?

A. There is nothing but curves; I don't know but one piece of straight track and that is just a few miles.

Q. Are there some sharp curves?

A. Yes, sir.

Q. In your judgment with a truck of that description is there any difference, as far as safety is concerned, between the ball drivers or having the front drivers with a flange?

A. I think Mr. Shelby I would rather run the engine with a ball driver than with the three flange drivers.

250 Q. Why?

A. Because the engine will take a curve better, it doesn't make it so hard on the ties; it makes a small wheel base with the three flange drivers.

Q. Does that give a longer or shorter wheel base to the engine?

A. It gives a longer wheel base.

Q. And in the turning of curves is it a desirable feature or not to have your rigid wheel base shortened as much as possible?

A. Yes, sir.

Q. The larger type of engines now in use, is that the truck of that description there (indicating) or do you use the swinging center plate truck?

A. We don't have the four-wheeled truck. We have what is known as the tongue truck.

Q. That is these larger engines?

A. Yes, sir.

Q. Do you mean the larger passenger engines or the freight engines?

A. The large passenger engines. They have the four-wheel truck but the swinging center truck.

Q. Now in relation to the freight—what do they have?

A. They have the two-wheeled truck.

Q. What sort of truck is in general use on these large engines?

A. The swinging center truck.

Q. Why has that been adopted by these large engines in use now?

A. I can't answer that question exactly, but in the construction of the engine you can get a better truck.

Q. What do these large engines that they have now weigh as compared with engine 143?

A. I will say they weigh forty per cent more.

251 Q. In the swing center plate is it practicable to have the ball drivers?

A. No, sir.

Q. Why?

A. Because an engine in going around a sharp curve would lean over so far that the ball drivers would project off the rail.

Q. The custom then with these swing center plates is to have all the drivers on each side equipped with flanges?

A. Yes, sir.

Q. In your judgment is there any difference, as far as liability to mount the rail or ride the rail is concerned, and as far as the safety in operation in that respect is concerned, between the engine equipped with the swinging center plate and the flange tire and the engine equipped with the non-swinging center plate and the ball driver?

A. I don't understand your question.

Q. Is an engine of this type with a non-swinging center plate and the ball driver any more liable to derailment than one of the large types of engines with the swinging center plate and the flange tire?

A. No, sir, I don't think so. I think that is one of the best trucks that is built according to my idea for that class of engines.

Q. Do you know where 143 is now?

A. On the Cincinnati Division.

252 Q. Which is considered the more important division in reference to the amount of traffic, the Cincinnati division or the Lexington Division?

A. The Cincinnati Division.

Q. Do you know where engine 142 is now?

A. She is on the Huntington Division.

Q. Do you know where engine 141 is now?

A. I understand she is on the Huntington Division.

Q. Is the Huntington Division a division over which heavy travel and traffic pass?

A. Yes, sir.

Q. Has there been any change in the late in the size of engines?

A. Yes, sir, in the last few years there has been an increase of fifty per cent I believe.

Q. Does the swinging center plate that is used on these large type of engines, when you take into consideration that it is required to have the flange on the front driver, does that make an engine any safer to enable her to take the curves any better than an engine of this construction (Indicating) that is the construction of engine 143?

A. I would not think so.

253 Having heard the foregoing part of the evidence and there not being time to conclude, the Jury is admonished by the Court and put in charge of the sheriff and court is adjourned until 9 o'clock the following morning.

On the following morning at 9 O'Clock, pursuant to adjournment, court convened and the trial continued as follows:

Q. Mr. Hobson you stated at the time of the adjournment yesterday that the size of engines had been very much increased in late years. I will ask you whether the Company of late years has adopted the practice of using the flange wheel instead of the ball driver, and if so, the reason therefor?

A. Yes, sir, there are two or three reasons. The Master Mechanics made a test as to whether or not the flange tires were as safe as the ball drivers and after a thorough test they reported that they were. And another reason is, that it is more economical to carry all tires alike in order to keep from carrying too large a store of tires.

Q. Which is the more economical tire to use in actual experience, the flange or the ball?

A. The flange; it is a cheaper tire than the ball. The flange is five and three-quarters and the ball is six and one-half in width.

Q. The question as far as safety was concerned was not whether the ball tire was as safe as the flange but whether the flange could be made as safe as the ball tire?

(The foregoing question objected to, which objection the Court sustained.)

254 Q. You have spoken of the use of the ball driver, that it made a less rigid wheel base for the engine. Why is that? Why does the ball tire make the rigid wheel base shorter?

A. Of course the ball driver on the front wheel having no flange on it would naturally shorten the wheel base and passing around a

curve the wheel is loose on the track and not being bound by a flange it would shorten the wheel base.

Q. What do you mean by the wheel base of the engine?

A. From the center of the first and last tire the wheels with flanges on them is what you call a rigid wheel base.

Q. The total wheel base itself with regard to its rigidity is from what point to what point?

A. From the center of the front wheel to the center of the back wheel.

Q. If all of the tires on the drivers are flange drivers is the whole of the wheel base what you call a rigid wheel base then?

A. Yes, sir.

Q. Then if you have the front pair of drivers ball drivers the rigid wheel base extends from what point to what point?

A. From the front to the back drivers with flanges.

Q. Now what effect upon the point of taking a curve has it to shorten the rigid portion of the wheel base?

A. When you place the ball tire on the front pair of wheels you shorten your wheel base and do away with the friction on the wheel in passing around a curve and the engine is not cramped as much.

255 Q. Is there any difference in your judgment as to which will stay on the track best? I mean which is more liable to derailment?

A. It is perfectly natural that the more base wheel you have the less liable you will be to stay on the track.

Q. Take that model there—which has been in evidence—When the upper casting is fit into that lower casting what is the amount of play that it has?

A. About one-fourth of an inch.

Q. What is the amount of lateral play in the truck with the swinging center plate?

A. When we built the trucks new we give them a quarter of an inch side play in the boxes.

Q. I am talking about the swinging center plate?

A. I judge about an inch and a half, something like that.

Q. What was the effect of that increase of play in the swinging center plate upon the use of the ball driver?

A. You could not operate an engine with a swinging center plate with the front driver ball. It would not be practicable.

Q. Were you at the scene of this wreck at all?

A. No, sir.

Q. You don't personally know from your own observation the conditions that were found to exist?

A. No, sir, I do not.

Q. During the course of your experience in the mechanical department of the Railway Company there have been cases of derailment of cars and engines that have come under your observation with more or less frequency?

A. Yes, sir.

256 Q. Are those derailments made the subject of investigations from the Railroad Company with a view of finding out the cause of them?

A. Yes, sir, I have been to a number with different men and they have never determined what has caused the derailment.

Q. Those investigations are conducted in the first instance by the local authorities of the particular division?

A. Yes, sir, by the Superintendent, Master Mechanic and Division Engineer.

Q. If they cannot ascertain the cause of it is there other investigation?

A. Yes, sir, it is taken up by the higher officials. I have been in a number where we could not make any definite report as to the derailment.

Q. Assuming that the rail where the engine left the track was worn to the extent of the drawing which I show you now, and assuming the engine which left the track was this engine 143 with the center bearing truck of the character which has been described in evidence, that she was a ten-wheel engine, that is, with six drivers and four truck wheels, and that the front drivers were ball drivers, and running at the rate of thirty miles an hour, the engine climbed the rail and after running some three hundred feet on the ties went over the embankment, are you able to say from those conditions whether in your judgment that supposed condition of the rail and that supposed condition of the engine truck and drivers could, either separately or together, could account for this derailment?

257 A. I don't think so, Mr. Shelby.

Q. Was that wreck in point of fact made the subject of investigation by the local authorities of this Division?

A. I understand so.

Q. You were not upon this division at that time?

A. No, sir, but I know every derailment is thoroughly investigated and reported.

Q. You were not upon the examination board at that time?

A. No, sir, not on this division.

(Cross-examined:)

Q. Did I understand you to say you were a railroad engineer?

A. No, sir.

Q. Did you ever run a locomotive?

A. I never run one for pay.

Q. Do you say that you are an experienced locomotive engineer?

A. I have had all kinds of experience but not a locomotive engineer.

258 Q. Did you ever build a railroad track?

A. No, sir.

Q. Were you ever connected with the department that had the building or maintenance of the tracks?

A. No, sir.

Q. Mr. Hobson what in your opinion did cause that train to leave that track?

A. I have no idea.

Q. Well you do know there was some cause?

A. There was bound to have been some cause, but I wasn't on the ground and don't know except what I have heard.

Q. I am asking you for your judgment?

A. Well, I don't know.

Q. You have no idea?

A. No, sir.

Q. Mr. Hobson if that rail had been worn that way (Indicating) on that track it would not have left the track under the condition Mr. Shelby mentioned to you?

A. I could not say.

Q. What is your best judgment?

A. I don't know a thing about it.

Q. Well you did undertake to give an opinion that you didn't think these conditions had anything to do with the train leaving the track? Give your best idea about it? Do you think that if the track was in that condition and the rail worn like that that it was a safe track?

A. Yes, sir.

259 Q. Is it your judgment as a railroad man that that kind of a rail on an eight degree curve is as safe as a new rail?

A. I can't answer that question but have seen roads with a rail as bad as that.

Q. I am asking you for your judgment as a railroad man—if that rail is as safe for the men driving trains over the track with a worn surface like that on an eight degree curve as it is with an upright surface like that?

A. The only answer that I can make to that is that if a person would allow the rail to wear and get in a dangerous condition he would not have the job very long I don't think.

Q. Do you understand my question?

A. Yes, sir.

Q. Then why don't you answer it?

A. The reason I don't I have nothing to do with the track and am not in a position to say.

Q. Why did you say a moment ago that in your opinion that is a safe rail?

A. Because I have seen trains operate on a track worn as much as that.

Q. Don't you know they are more apt to get off a bad track than a good track?

A. Certainly.

Q. You are willing then to express your opinion to this jury as to whether it is as safe railroading to have that kind of a worn rail on the upper side of an eight degree curve as it is to have an upright angle presented by a new rail?

260 A. I have never made a study of it, never had anything to do with the track and are not in a position to say.

Q. Did you ever build one of these trucks?

A. Yes, sir.

Q. Just like that?

A. I can't say whether it was just like that one or not; I can't answer that, I don't know.

Q. How long have you been in the mechanical department.

A. Twenty-eight years.

Q. Has that road been building that kind of trucks for twenty-eight years?

(The foregoing question objected to, which objection the Court sustained.)

Q. Didn't you just say that you had built railroad trucks for this road?

A. Yes, sir.

Q. Now, then, isn't it true that the Chesapeake & Ohio Railroad hasn't built any of these trucks for twenty-eight years?

A. I will say this—that if that engine had been destroyed I would build a duplicate truck like that.

Q. You think that would have been as safe?

A. Yes, sir, I would build a duplicate truck to that. I had that engine in the shop about six months ago and the engine was overhauled and that truck put back under it.

261 Q. What would it cost to put the bar truck over this one—which is the cheapest?

A. I suppose one is about as cheap as the other. That large casking is made of iron, the other is made of wrought iron.

Q. Which is the most expensive?

A. I suppose the wrought iron is a little more expensive. I cannot say that it would be, because that casking would weight considerably more than the wrought iron would.

Q. What about the center casking truck—what about the cost of that?

A. I never compared that—there is very little difference in the cost.

Q. Now will you tell this jury in the face of the experience and practice of your company and other railroad companies that if you had to put a new truck tomorrow under engine 143 why you would rebuild this one?

A. Because it is considered the safest truck on that class of engines.

Q. Mr. Hobson what would it have cost to have put the flange on that ball driver?

A. It would just cost two new drivers; they are in the neighborhood of fifty dollars a piece.

Q. And what would have been the cost of the new truck?

A. I would say there is not much difference in the cost of the different kinds of trucks that we use. Understand, we have different classes of engines on the road and every class has a different kind of truck. I suppose there are twelve or fifteen classes of engines and they all have a different class of truck.

262 Q. Mr. Hobson when you put flange tires on the front driver you say that increases the length of your rigid wheel base?

- A. Yes, sir.
- Q. And you say that makes it more difficult for the engine to take the curve easily?
- A. Yes, sir.
- Q. And you say in your opinion that that is not as desirable as ball truck for that reason?
- A. Yes, sir.
- Q. Didn't you also say that this board of Mechanical engineers who passed upon the matter finally said it was as safe?
- A. Yes, sir.
- Q. You seem to differ from that, don't you?
- A. Yes, sir.
- Q. What per cent has the size of the locomotives increased in the last ten or fifteen years on this road?
- A. I don't know exactly; I would say fifty per cent.
- Q. What per cent has the size of the freight cars increased?
- A. I would say forty per cent.
- Q. What per cent has the length of the trains increased in the last ten or fifteen years?
- A. I would say one hundred per cent.
- Q. What per cent has the speed of the trains increased?
- A. I don't know that they have increased any.
- Q. What per cent has the cost of maintaining tracks, section hands &c. increased in the last fifteen or twenty years?
- A. I could not answer that question.
- 63 Q. Have they increased any?
- A. Yes, sir.
- Q. Why?
- A. Well they pay more for the steel and almost double as much for the tires I understand.
- Q. But they have reduced their labor—the number of men?
- A. I don't know.
- Q. Don't you know they have done away with one section?
- A. I don't know.
- Q. How many men are there in a crew?
- A. I don't know, just noticed them in passing, though I think there are five or six.
- Q. Did I understand you to say that engine 143 had been on the Huntington division before the injury to Kelly?
- A. Yes, sir.
- Q. You knew she was taken over there?
- A. Yes, sir.
- Q. You saw her?
- A. Yes, sir.
- Q. Did you ever ride on her?
- A. Yes, sir, many a time.
- Q. Did you know a man by the name of H. B. Fox?
- A. I know Henry Fox, an engineer running out of Huntington.
- Q. That's the man.
- A. Yes, sir, I know him very well.

Q. Do you remember of engine 143 when she was over there before Kelly was killed being in the ditch and Fox under it?

264 (The foregoing question objected to, which objection the Court overruled, to which ruling of the Court defendant excepts.)

A. No, sir, I do not. I never heard of that; I know of Fox being in a wreck but don't know the engine.

Q. Did you hear that it was this engine 143?

A. I might have heard it.

Q. Were reports of that kind of wrecks sent to you at that time?

A. You know I haven't been on the Huntington division for about ten years; if I was on that division I was Assistant Master Mechanic and reported it.

Q. Well don't you keep reports of that kind?

A. Yes, sir, file them in the office.

Q. That made no impression on you?

A. No, sir, I don't recall it.

Q. By the way Mr. Hobson, does the company keep records of the engines' mishaps?

A. Yes, sir.

Q. Do you know where the record is of engine 143?

A. No, sir, the report on the engines is sent to Richmond, Virginia.

Q. Is there anybody here for the Railroad Company from its mechanical department from Richmond, Virginia?

A. Yes, sir, Mr. Terry.

Q. What is his office?

A. He is Assistant Superintendent of the board.

Q. Don't these reports go to his office.

A. No, sir, to the Superintendent's office.

Q. Haven't you adopted flanges on your engines now without regard to size?

A. Yes, sir.

265 Q. And without regard to the length of the wheel base?

A. Yes, sir.

Q. Do you know what was the object in using the rigid bar construction rather than the solid plate construction in the trucks?

(The foregoing question objected to, which objection the Court sustained.)

Q. Isn't the arch bar used more than the solid plate construction?

A. We haven't been ordering but a few engines with the four wheel trucks under them for the last twenty years; all of them ordered was the swinging truck.

Q. I have asked you and will ask you again if your road doesn't use more of the arch bar trucks than the solid casking trucks?

A. Yes, sir.

Q. Now I want you to state what was the object of the Company in using the arch bar construction rather than the solid plate construction?

A. I cannot give you that reason, but would like to say that that is the best four-wheel truck I ever saw built; it costs less to maintain that truck.

Q. Is that the reason you are keeping that sample?

A. I don't know where that came from, I never saw it before until I came in the court room here.

Q. How many trucks have you now in use on this division of the Chesapeake & Ohio?

266 A. I don't know; I don't know the class of engines they have.

Q. How many new engines have you on your division?

A. About one hundred.

Q. How many ball driver engines have you on your division that are new. On the road, I don't mean in the yard?

A. I don't know for sure, but think there are two. We have taken all the small engines out of service over at Covington with the exception of two or three; one we use for the tool car and a couple of the work trains.

Q. Isn't it a fact that the only locomotive on that division which has that type of a truck under it is 143?

A. Yes, sir.

Q. And hasn't she flanges on her now?

A. Yes, sir.

Q. Do you know how many engines there were in 1911 on the Lexington Division?

A. No, sir, I do not.

(Re-examined:)

Q. Mr. Hobson you say on the Cincinnati Division, which is your division, you now have about one hundred engines?

A. Yes, sir, about.

Q. And most of the smaller engines have been taken out of actual service and are used simply for work trains?

A. Yes, sir.

267 Q. Is or is not that due to the condition of railroad traffic which has led to the use of larger engines to be more economical?

A. Yes, sir, it is.

Q. It has been ten years since you were on the Huntington Division?

A. I suppose it has been about eighteen years.

Q. Do you remember at what period during that eighteen years of service 143 was used on that division?

A. As well as I can remember those three engines were on the Huntington division, between Huntington and Clifton Forge for eight or ten years.

Q. What years, approximately, do you remember?

A. Let's see now. I think they came there in 1900, possibly before that, Mr. Shelby.

Q. Judge O'Rear asked you what it would cost to put on two flange tires in the place of those two ball drivers. You estimated that at about fifty dollars?

A. Yes, sir.

Q. Did the question of cost have anything to do with you not putting the flange tires on instead of the ball drivers?

A. No, sir.

Q. Judge O'Rear asked you something about whether the Chesapeake and Ohio Railway built any of those trucks now. Does the Chesapeake & Ohio build any of the trucks of its engines or build them with the engines?

A. The trucks are bought with the engines. We have never to my knowledge changed any trucks on the engines or built a new truck unless it was in such shape that it could not be repaired.

268 Q. You mean rebuilt?

A. Yes, sir, I should have said that.

Q. You were asked as to the reason for the greater use of the arch bar construction on these rigid trucks. I will not ask you which is the most easily kept up and maintained and which can be furnished at less expense, the arch bar or this truck? (Indicating.)

A. This truck. I stated that.

Q. If this truck is broken with the solid casting is it not more difficult and expensive to repair.

A. Yes, sir, a great deal more so.

Q. In reference to the length of time that it would take to replace an arch bar and to replace a solid casting like that (Indicating) which could be replaced the quicker?

A. The arch bar could be replaced in one-third the time; less than that.

Q. What is the size of these arch bars?

A. As well as I remember Mr. Shelby the bars are about an inch by four, but I don't know exactly; that's about the size.

Q. It depends on the weight of the engine?

A. Yes, sir.

Q. What was the weight of this engine upon the trucks?

A. About 29000 on the truck.

Q. The engine 143 weighed about 133000 I believe?

A. Yes, sir, that is the engine alone.

Q. But the truck itself was 29000 pounds?

A. Yes, sir.

269 The next witness introduced on behalf of the defendant was L. F. FRAZER, who first being duly sworn testified as follows:—

Q. Your name is L. F. Frazer?

A. Yes, sir.

Q. Where do you live?

A. In Mt. Sterling.

Q. Are you connected in any way with the Chesapeake & Ohio Railway?

A. Yes, sir.

Q. How long have you been with them?

A. Well I have been with the road for twenty one years.

Q. What position do you now hold?

A. I am supervisor of the track.

Q. How long have you held that position?

A. Three years and seven months.

Q. As Supervisor of the road what are your duties?

A. I am supposed to see that the tracks are kept in good condition.

Q. What part of the road is under your control?

A. From Denton to Lexington.

Q. In performing your duties does it requires you to go over the road?

A. Yes, sir.

Q. In going over the road what manner of travel do you use?

A. Well I go on the train, ride velocipedes and ride the engines.

270 Q. If there is any part of the road that needs repair what do you do?

A. I have it done.

Q. Who do you order to do it?

A. The section force.

Q. Do you remember when Mr. Kelly was killed?

A. Yes, sir.

Q. Do you know about the point where he was killed?

A. Yes, sir.

Q. Had you been over that portion of the road a short time before that?

A. Yes, sir, I go over it from two to three times a month. I don't walk over it that often.

Q. Were you over the road just after the accident?

A. Yes, sir.

Q. Did you see just where it occurred?

A. Yes, sir.

Q. Did you see where the engine clim-ed the rail?

A. Yes, sir.

Q. Did you see the condition of the rail and track there?

A. Yes, sir.

Q. Tell the jury whether or not that track where the engine clim-ed the rail was in a safe and good condition?

A. Yes, sir.

271 Q. You say it was in good condition?

A. Yes, sir, it was in good condition clear around on the curve as far as I could see.

Q. What was the condition of the track all along there on that curve before the accident?

A. It was in safe condition there.

Q. I will get you to look at that piece of rail (handing the piece of rail in evidence to the witness) and tell the jury whether or not a rail in that condition is safe for trains to run over it?

A. Yes, sir, this rail is perfectly safe.

Q. In going over the road Mr. Frazer how often would you ride the engines?

A. I would ride the engines right often, I don't know exactly.

Q. Did you have any instructions to ride on the engines?

A. Yes, sir.

Q. Had you ridden on the engine with Mr. Kelly?

A. Yes, sir.

Q. How long before that?

A. I don't remember, but anyway I hadn't been on that engine for two or three weeks.

Q. When you were riding with Mr. Kelly was he running the engine 143?

A. Yes, sir.

Q. Was there any reason why you hadn't been riding lately on the engine with Mr. Kelly?

A. Yes, sir.

272 Q. What was the reason?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court defendant excepts.)

By the Court: You have the right in a general way to prove whether or not he was a safe man to handle the engine.

Q. What was Mr. Kelly's habit in running his engine around curve?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court defendant excepts, and avows that if the witness was permitted to answer he would state that Mr. Kelly's habit in running around a curve was not to put on his brakes but to continue at the rate of speed that he was running on a straight track.)

(Cross-examined:)

Q. If you had been of the opinion that that track was unsafe at the point where Mr. Kelly lost his life, or if it had been unsafe and you had been mistaken in your opinion about it and had failed to have it repaired, would you not have lost your job?

(The foregoing question objected to, which objection the Court sustained.)

273 Q. Mr. Frazer where were you when this case was tried last April?

A. I was on the road somewhere.

Q. You were living in Mt. Sterling?

A. Yes, sir.

Q. You were not here as a witness, were you?

A. No, sir.

(Re-examined:)

Q. None of the attorneys for the defendant had talked to you about the case at that time nor knew what you would testify to, did they?

A. No, sir.

Q. They learned that at this term of the Court?

A. Yes, sir.

The next witness introduced on behalf of the defendant was L. B. ALLEN, who first being duly sworn testified as follows:

Q. Mr. Allen where do you live?

A. At Covington.

Q. What is your age?

A. Thirty-four.

Q. What is your profession?

A. Civil Engineer.

274 Q. Are you connected with the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Engineer Maintenance of Way.

Q. What duties does the term "Maintenance of Way" cover?

A. It covers the keeping of the track, bridges, buildings and structures of various kinds.

Q. And over what portions of the railway of this defendant does your jurisdiction as engineer of Maintenance of Way extend?

A. Through Kentucky, to Chicago on the Indiana Division.

Q. Where did you take your technical course of civil engineering?

A. At the Kentucky State College at Lexington.

Q. Since your graduation you have been engaged exclusively with that part of engineering which relates to railways?

A. Yes, sir.

Q. How long have you been in the actual service of the Chesapeake & Ohio Railway as Civil Engineer?

A. Fourteen years.

Q. How soon after the accident in which Mr. Kelly lost his life did you see the place where it occurred?

A. The accident occurred on the afternoon of one day and I was there about daylight on the following morning.

Q. You went from Covington to Ashland and then out to the scene of the derailment?

A. Yes, sir.

275 Q. Did you make an examination of the place on this particular curve where the truck wheel first climbed the track?

A. I did.

Q. What was the location of the mark which evidenced that climbing of the truck in reference to the nearest joint on the rail?

A. The first mark was about three feet from the joint west of the joint where the derailment occurred.

Q. How far from that point where the truck wheel climbed the rail did the engine get off the road-bed and turn over?

A. About three hundred feet.

Q. Did you take the gauge of the track at the place where the truck wheel first climbed the rail?

A. I did.

Q. State whether or not the track was in alignment?

A. Yes, sir.

Q. Was there any tearing up of the ties or displacement of the rails at that point?

A. No, sir.

Q. If there had been any displacement of the rails sufficient to cause a derailment of the engine would the engine wheel have climbed the track or would it have fallen down between the rails?

A. If it showed a displacement in width it would not have climbed the rail but would have dropped down between.

Q. Were there any marks made by the engine wheels upon the ties?

A. Yes, sir, where the wheel had dropped down on the ties it had left an impression.

276 Q. Was that on the outside of the rail?

A. Yes, sir.

Q. About how far did those marks extend; that is those marks on the ties east of the first mark you spoke of, that is, the mark where the engine climbed the rail?

A. The mark started about ten feet from where the engine climbed the rail on the ties and the marks were on the ties on up to the point where the engine left the road bed and turned over; I have forgotten the exact distance but it was about 290 feet from where the engine left the track.

Q. About how far from the point where the engine first climbed the rail was it to the point where the track was torn or displaced?

A. About 130 feet if I understand your question.

Q. What was the condition of the ties in the track on that curve? I am speaking now of the entire space from the place where the engine climbed the rail to where she went over?

A. They were in good condition.

Q. What is the length of a rail?

A. Some are thirty feet and some thirty-three feet.

Q. How many ties are put under a rail?

A. Eighteen ties under a thirty-three foot rail.

Q. How many ties, I mean absolutely sound ties, would it be sufficient to constitute a safe road-bed as far as the ties are concerned?

A. Ten ties are considered enough to make the track absolutely safe.

277 Q. I will get you to state whether that is the accepted view among the best qualified engineers of maintenance of ways?

A. Yes, sir.

Q. Why is — then if ten ties are sufficient to make the track safe that eighteen ties are put in?

A. To increase the safety.

Q. You say that in your opinion the condition of ties on that curve were good. I will get you to state to the Jury, as far as you can do so, specifically the soundness or unsoundness of the ties at that place?

A. The ties were sound. There were at least ten absolutely sound ties in the rail length and the general condition of the ties was absolutely good.

Q. Were there any places in that space of track where there were as many as two or three doty ties or defective ties?

A. There were not three doty ties in that whole space from the point where the engine was derailed to where it turned over.

Q. Not three ties that were defective in that rail length?

A. No, sir.

Q. Did you state to the jury whether that examination which you made there was with the view of ascertaining as far as you could the cause of the derailment and the condition of the track?

278 A. It was.

Q. What was the material of which those ties consisted?

A. Principally white oak with a few locust ties among them.

Q. Did you notice anywhere at that place where the engine turned over and where the track commenced to be torn up whether any of the ties were broken by the engine going over them?

A. Yes, sir, the ties were broken where the engine jumped the track.

Q. When an engine comes down on the ties running at the rate of thirty miles an hour will a sound tie stand the strain of that?

A. No, sir, it will be disfigured more or less.

Q. And will or will not a sound tie at different places break under that strain?

A. Yes, sir.

Q. Did you notice the rail on that curve?

A. I did.

Q. I will get you to state to the jury whether the inside of the outside, that is the left hand rail of the curve was worn to any extent?

A. It was worn to some extent.

Q. What produces that wearing?

A. The grinding of the wheel flange on the rail.

Q. About how many of the rails on that curve were so bent or twisted that they had to be ordered into the scrap pile?

279 A. Six or eight of them. I don't recall the exact number.

Q. Do you remember whether or not one of those rails that was at the point where the engine turned over had a piece cut off of the end of it?

A. Yes, sir.

Q. About how long a portion was cut off?

A. About a foot.

Q. Was a portion of that part which had been cut off sent to your office?

A. I think one section of it was sent to my office.

Q. That is the section which you produced at the last trial which was sent to your office?

A. Yes, sir.

Q. Will you file that and mark it "Allen No. 1"?

A. Yes, sir.

Q. What becomes of those bent or twisted rails?

A. They are put in the junk pile.

Q. Are they capable of being put back in the track again?

A. No, sir.

Q. Did you take an impression drawing of where the engine first climbed the rail?

A. I took the impression of the end of the rail about three feet of where the first mark of the engine climbing the rail was shown.

Q. How did you take that?

A. With a piece of paper. I slipped the paper in between the joints at the end of the rail and by rubbing the edge of the paper against the rail the impression of the end of the rail was transferred to the paper and afterwards that impression was outlined with a pencil.

280 Q. By yourself?

A. Yes, sir.

Q. Is this the impression you took?

A. Yes, sir.

Q. Will you file that and mark it "Allen No. 2"?

A. Yes, sir.

(Here follows sketch marked p. 280a.)

Observation No 26 June 28

Section Rail

85⁰ a s c. e car. 06.

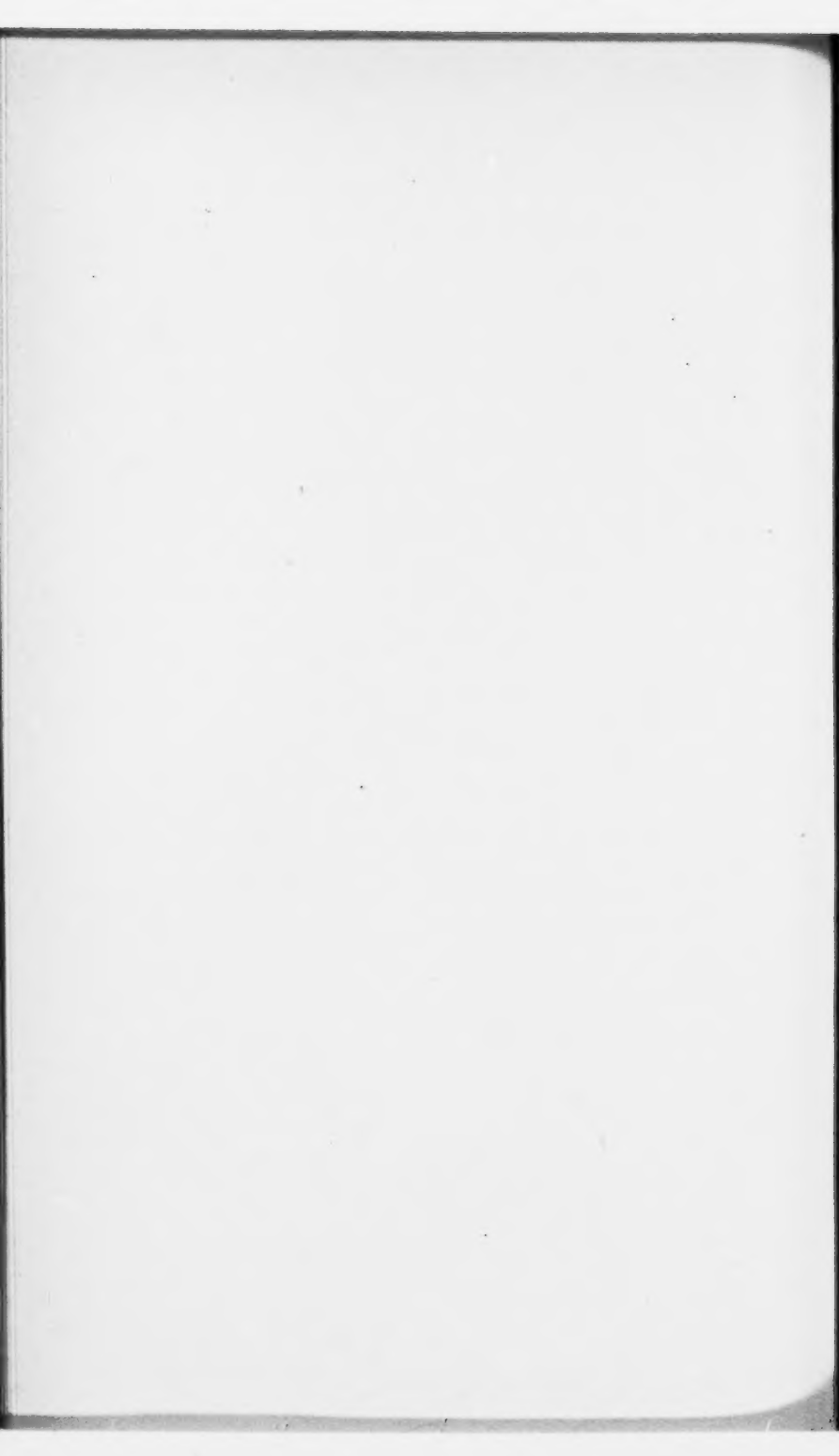
1 mile East Aden

85 # a s c e
Carnegie 1906
1 mile E. of Aden.
June 28th.

L. B. Allen

2

280a



Q. I will ask you whether the rail where the engine first mounted the rail was worn as much as the rail from which this specimen which has been introduced in evidence was cut?

A. I think not.

Q. About what *specimine* is the slope of the specimen of rail that has been introduced in evidence?

A. Between twenty and twenty-five degrees.

Q. About what angle was the rail that mounted the track worn to?

A. Less than twenty degrees.

Q. What was the weight of the rails in that curve?

A. Eighty-five pounds.

Q. I will get you to state to the jury whether upon a curve like this curve where the accident occurred and where the rail was worn to the extent of the steel specimen which has been introduced in evidence would be an unsafe or a safe rail to use?

A. It would be a safe rail to use.

Q. Mr. Allen please state to the jury whether the wearing of the ball to any extent, whether greater or less than that, would have any tendency to make the engine still mount the rail?

81 A. In practice we find it does not have.

Q. Suppose this ball was worn back as far as the web of the rail as a matter of practicable railroad engineering, speaking from that standpoint, would that have any tendency for the wheel to climb the rail?

A. No, sir.

Q. Would it affect the safety of the rail in any other respect?

A. It would after it had worn beyond the center.

Q. In your judgment would it have any effect in reference to the tendency of the wheel to climb the rail?

A. It would not.

Q. State to the jury why it is that in the construction of these rails and in the making of the ball more iron or steel than is necessary is put into the ball?

A. It is put in to take care of the wearing part and to increase the service of contact.

Q. It is no case of a fact of safety?

A. No, sir, it is not. Q. A rail with too thin a ball would be unsafe and might break under a strain.

Q. But it would not be unsafe in the sense that it had a tendency to climb the rail?

A. No, sir.

Q. Taking what is known as the best railroads in the country, leaving out the Chesapeake & Ohio, taking other roads that are recognized in your profession as being the best constructed and best managed under the modern experienced engineering operation, do you find curves like this at Aden with rails worn to that extent in them?

282 A. Yes, sir.

Q. After this accident in repairing the track were any of the rails taken up except the six or eight you have mentioned which were broken up and twisted and sent to the scrap yard?

A. Not for a year after that.

Q. Was this rail where the engine mounted the track left in the track?

A. It was for about a year.

Q. Just as it was?

A. Yes, sir.

Q. Were any repairs at the track at that point necessary in the reconstruction of things after the wreck?

A. Not at the point where the wheel climbed.

Q. Would you have allowed those rails to remain in the track for a year if in your judgment there had been any question as to their safety?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court defendant excepts.)

Defendant avows that if the witness was permitted to answer the question he would state that he would not.

Q. Have you any question in your own mind as to the safety of those rails that you left in the track?

A. No, sir.

283 Q. There is a great deal of running over that portion of the track?

A. Yes, sir, a big business.

Q. About how many trains a day passed over that track within a year after that accident?

A. I would say twelve or fourteen trains a day.

Q. What was your position upon the road at the time of this accident?

A. The same as it is now.

Q. You had a Division Civil Engineer under you?

A. Yes, sir.

Q. Who was he?

A. M. I. Forbes.

Q. Was he out to the place of the wreck with you?

A. No, sir.

Q. Is he still in the service of the company?

A. No, sir, he is engaged in the contracting business.

Q. What is the average life on a curve like that of an 85-lb. steel rail similar to this rail that was in that curve?

A. About eight years.

Q. How long had that rail been in that curve?

A. Five years.

Q. What is the average life of a tie?

A. A locust tie is seven years.

Q. How long had it been before the accident since the track had been resurfaced and new ties put in at that place?

A. About two years.

Q. Something has been said in this case about a derailment of this engine 143 at the mouth of the Leon tunnel which occurred in the year, 1910, I believe; at what end of the tunnel did that derailment take place?

- 4 A. That derailment took place at the west end of the tunnel, within ten feet of the mouth of it.
- Q. Did you go to the scene of that derailment?
- A. I got there in thirty minutes.
- Q. Where were you?
- A. I was at Leon station on another train.
- Q. I believe you heard the engine give the whistle for assistance?
- A. Yes, sir, and I got the section force and sent them on a hand-r.
- Q. Did you make any examination of the place where that derailment at Leon Tunnel occurred with a view of ascertaining the use of it?
- A. I did.
- Q. What did you find was the cause of it?
- A. I found that the surface of the track was bad, there were soft spots in the roadbed and a low place on the inside of the curve.
- Q. Those soft spots occur suddenly on railroad tracks?
- A. Yes, sir.
- Q. What causes them?
- A. Moisture and dampness in the road-bed.
- Q. How long had the rail been down at that point at Leon Tunnel?
- A. About a year.
- Q. Is it a difficult or easy matter to find the true cause of a derailment?
- 85 A. It is frequently a very difficult and often an impossible matter to determine the cause.
- Q. Are you familiar with that track of the L. & N. railroad between Frankfort and Lexington?
- A. Yes, sir.
- Q. Are there many or few curves upon it?
- A. Yes, sir, there are several.
- Q. Compared with this curve where this accident occurred are there any curves upon that portion of the L. & N. track that are sharper than that curve?
- A. Yes, sir, three or four that I know of.
- Q. What are the degrees of some of these curves of the L. & N.?
- A. Ten and fifteen degree curves.
- Q. Where is the fifteen degree curve?
- A. Just east of Frankfort; about where you leave the river and about opposite the new Capitol.
- Q. Take the curves on the C. & O. on that portion of the road between Huntington and Clifton Forge that crosses the Alleghany mountains, how about the curves on that?
- A. There are a number of sharp curves there.
- Q. Do you know that type of large engine known as the Mallory engine?
- A. Yes, sir, I have seen engines of that type.
- Q. How many wheels have they?
- A. Sixteen.
- 86 Q. Did you ever see any with twenty-four wheels?
- A. Yes, sir.

Q. Now how is the weight of the engine on one of that large class distributed?

A. Over the entire length of the engine.

Q. The whole weight of the engine never rests upon the road at any one point?

A. No, sir.

Q. How does the length of one of these engines compare with engine 143?

A. It is very much longer.

(Cross-examined:)

Q. As a matter of fact those Mallory engines are two engines, aren't they? There are two frames for the wheels?

A. Yes, sir, two sets of wheels.

Q. You don't mean the Jury to understand that that is one large rigid frame in which there are sixteen driving wheels?

A. No, sir, it is divided into two sections.

Q. Allowing the engine to give to the curve?

A. Yes, sir.

Q. When you reached the point of the wreck on the morning after it occurred the track was repaired so the trains could pass over it?

287 A. I could not see any signs of a wreck and the rails had been replaced where the engine went over.

Q. The trains went over it, did they?

A. When I got there they were going over it.

Q. Mr. Allen that point where the curve is is a fill isn't it?

A. Yes, sir.

Q. How high is that?

A. Four or five or six feet.

Q. Where that engine actually turned over is greater than that, isn't it?

A. It's no more than six feet.

Q. There was a fill where the engine left the track?

A. Yes, sir.

Q. That entire curve is a fill, isn't it?

A. Yes, sir.

Q. When had you been to that point before the accident?

A. I cannot state.

Q. Had it been a year?

A. I had been over it a number of times.

Q. I am not talking about that. I mean when you had been to that point before the accident?

A. I can't say just when, but I walk over the track and inspect it frequently.

Q. Can you say you have been over that track within a year?

A. I can't say, no, sir.

288 The next witness introduced on behalf of the defendant was C. H. TERRELL, who first being duly sworn testified as follows:

Q. Your name is C. H. Terrell?

A. Yes, sir.

Q. Where do you live?

A. Richmond, Virginia.

Q. What is your connection with the Chesapeake & Ohio Railway Company?

A. Assistant Superintendent of Motive Power.

Q. What are the functions of that office?

A. I look after the rail stock in a general way of the company.

Q. How long have you been in that position?

A. Since October 1st of last year.

Q. What were you before that?

A. I was Superintendent of Motive Power in West Virginia.

Q. Where were your headquarters?

A. At Huntington.

Q. How long did you hold that position?

A. About three years.

Q. And what were you before that?

A. Master Mechanic of that division.

Q. Are you a practical mechanical engineer as well as a theoretical one?

A. No, sir.

Q. What was your course from the shops on up?

A. I served a regular apprenticeship in the shops at Huntington, from that I went to the position of gang foreman, from that to general foreman, from that to Master Mechanic.

Q. How long had you been in that department of the railroad service?

A. Since 1874, thirty-nine years.

289 Q. Are you familiar with the practical details of locomotive construction?

A. Yes, sir.

Q. How many engines were upon that division of the road under you when you were Master Mechanic at the Huntington shops?

A. About three hundred.

Q. How many men were under you at the Huntington shops?

A. Most every day there were seventeen hundred.

Q. What is the general character of the work done at the Huntington shops?

A. General repairing and some new work.

Q. Is it necessary in the course of these repairs to rebuild locomotives?

A. Yes, sir.

Q. It is a fact that you did at the Huntington shops most of the heavy over-hauling of all the engines west of Clifton Forge?

A. Yes, sir.

Q. Both upon that division and also upon the division here in Kentucky?

A. Yes, sir, the general work was done at that shop.

Q. Those were the biggest shops on the C. & O.?

A. Yes, sir.

Q. On an average how often does an engine go into the shop for a general over-hauling?

A. That is governed by the mileage the engine makes, Mr. Shelby. From ten months to two years, according to the run they are on.

Q. You are speaking now of the course of averages?

A. Yes, sir.

Q. Are you familiar with the type of truck construction illustrated by the model which has been used in evidence here?

A. Yes, sir, I think I am.

Q. Have you any personal recollection as to the character
290 of truck under engine 143?

A. Yes, sir.

Q. Was that the kind of a truck? (indicating)

A. Yes, sir, that is the style.

Q. I will get you to state from your own experience and also from the general consensus of opinion among Master mechanics and men in the mechanical department of railway companies as to whether or not that is a safe and proper type of truck construction?

A. Yes, sir.

Q. In this type I believe the center plate consists of a solid casting?

A. Yes, sir.

Q. What is meant by the rigid bar construction?

A. That would have a large center plate with a rigid bar running from the front and back to which the center plate is bolted.

Q. Now as far as rigidity is concerned and as far as the capacity for lateral motion is concerned, is there any difference in your judgment between this solid plate method of construction and the rigid bar?

A. Not a bit that I know of, one is as rigid as the other.

Q. In point of speed in your opinion is there any difference in the method of construction?

A. I never heard that question raised, there is no difference at all?

A. What in your judgment as far as speed is concerned against derailment is the effect of using the front driving wheels ball instead of the flange driving wheels with this sort of truck?

A. In my opinion the engine with the ball driving wheels is better than an engine with the flange drivers in front.

A. Why?

291 A. Because the engine has a better chance to take the curve. With the flange drivers the flanges are bound to ride hard against the rail on account of the rigid wheel base in making the curve.

Q. It is a fact that having the front drivers ball drivers tends to shorten the rigid wheel base?

(The foregoing question objected to, which objection the Court sustained, to which ruling of the Court defendant excepts.)

Q. It is a fact, I believe, that in late years the flange front driver has been substituted for the ball?

A. Yes, sir.

Q. They claim that that prevents the excessive wear on the truck and also distributes the wear on the driving boxes do they not?

A. They are the principal reasons. I might say further that they are being used from an economical standpoint, the ball drivers cost more. They are heavier and wider and rather an unhandy tire to carry in stock.

Q. On an engine with six drivers there would be two balls and four flanges?

A. Yes, sir.

Q. Has that substitute of the flange front driver been induced by any opinion on the part of the mechanical department that it made a safer engine than the ball driver?

A. I think not, sir.

Q. You of course heard about the derailment we have under investigation?

A. Yes, sir.

Q. Assuming that that was an eight degree curve and that the rail on the outside of the curve and on the inside of the outside rail was worn as you see in this steel specimen in evidence, and that the engine mounted the rail, the rail being worn as indicated in this specimen, that it was engine 143 with the sort of truck that
292 is illustrated by this model, and that the front driving wheels were ball drivers, and that after mounting the rail running on the ties for some three hundred feet she went over, I will get you to state to the jury whether in your opinion the equipment of the engine with that character of truck and the use of the ball drivers had anything to do with that derailment?

A. In my opinion I would say no. I would like to say that that class of engine was run on as crooked a road as you have here for years; three of them were run on our fastest trains on the Allegheny district between Hinton and Clifton Forge; they were run for three or four years and finally replaced by heavier engines on account of the trains getting heavier, and were never bothered with derailments.

Defendants desires to file as an exhibit the model of truck which has been introduced in evidence, it being understood that there were none of the air-brake attachments with engine 143.

Both sides announcing through with their testimony, counsel for defendant again renewed their motion for a peremptory instruction to find for the defendant, which motion the Court overruled, to which ruling of the Court defendant excepts.

STATE OF KENTUCKY,
Montgomery County, sct:

I, Pearl Lane, Official Stenographer for Montgomery Circuit Court, do certify that the foregoing transcript is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected, and all the exceptions, objections and avowals con-

cerning the same as well as all papers and exhibits offered to
293 be or used as evidence in the trial.

Witness my hand this 15th day of November, 1913.

PEARL LANE,

Official Stenographer Montgomery Circuit Court.

Examined and approved this 28th day of January, 1914.

WM. A. YOUNG,

Judge Montgomery Circuit Court.

294 The Court being sufficiently advised, it seems to them there
is no error in the judgment herein. It is therefore, consid-
ered that said judgment be affirmed, which is ordered to be certified
to said Court. It is further considered that appellee recover of
appellant her costs herein expended.

295 Court of Appeals of Kentucky, October 15, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
VS.

MATT KELLY'S ADMINISTRATRIX, Appellee.

Appeal from Montgomery Circuit Court.

Opinion of the Court by Judge Nunn, Affirming.

On the morning of June 28th., 1911, one of appellant's east
bound passenger trains was derailed two miles east of Aden in Carter
County. There was a curve of about eight degrees at the point where
the derailment occurred. The curve bent toward the right, and the
left hand or outside rail was, therefore, the higher. The wheel of
the engine truck climbed this left hand rail. The engine ran upon
the ties some 300 feet, and then left the roadbed entirely, going
down an embankment. The engineer, Matt Kelly, was caught
under it and killed.

Kelly had been in the employ of appellant for 20 years con-
tinuously, and for most of this time serving as a locomotive engi-
neer. He was 48 years old and left surviving and dependent upon
him a wife, age 45, and five infant children. He was earning
\$192.00 per month as engineer, and was an intelligent and industri-
ous man, steady, sober and frugal in his habits.

296 This action was brought under the Federal Employers'
Liability Act to recover the damages sustained by his widow
and children. There have been two trials. On the first, there was
a verdict for \$18,000, but this was set aside in the lower court.
This appeal is from a judgment rendered on a verdict in the second
trial for \$19011.00.

The verdict was as follows:

"We the jury find for the plaintiff in the sum of \$19011.00;
be proportioned as follows: Mrs. Addie Kelly, \$7040; Carroll Kelly

\$1288; Matt L. Kelly \$1580; Ruth Kelly \$2273. Tom Kelly \$4371; Richard Kelly \$2459. Total \$19011."

The basis of recovery was the alleged negligence of the railway company with reference to the engine and its equipment, and defects and insufficiencies of the roadbed, rails and ties.

The evidence of appellee went to show that this lefthand or outside rail on the curve was defective and dangerous in that the top or "ball" of it, which was climbed by the engine, was worn, that is, beveled off, beyond the point of safety. By the constant wear of car-wheels against it in turning the curve, this outside rail was beveled on the inside to as much as 45 degrees from a vertical, as the testimony of some of the witnesses shows. A section of the rail is before us. The beveled surface is steeper than 45 degrees, perhaps not more than 20 degrees, but it is so worn that the point of the bevel on top of the rail is even with an extended line of the "web" or upright part of the rail. This rail-section didn't come from the rail

where the engine left the track. It was supplied by appellant, and came from some other rail in that curve, but for purposes of this case, we will assume that none of them were

worn or beveled any more than this. The engine was No. 143, and had been in constant use since 1892. It was built with a flangeless front driving wheel or, as referred to by some of the witnesses, a "bald" driver. The pony truck at the front of the engine had four wheels. This truck is known as the rigid center-plate type. Modern engines are equipped with the swinging center-plate. The modern swinging center-plate, as the name implies, is one which has a lateral motion instead of being fixed, and which, therefore, moves laterally or "gives" to the rail as the engine tracks the curve. The pony truck under this engine was of the rigid solid casting center-plate type. The proof of appellee goes to show that a locomotive and train of cars running on a straight track have a tendency to continue their straight course when reaching a curve in the track, and would do so but for the flanged wheels operating against the outer rail of the curve. The first wheel to meet this resistance of the curve is the front wheel of the pony truck, and it, therefore, receives the first shock. Of course, the sharper the curve and the higher the speed, the greater the burden on both flange and rail. A less rigid truck obviously will conform more easily to the curved track, and a sound, unworn outside rail will, of course, offer more resistance to the flange on any type of truck. With the natural tendency of an engine at high speed to lift or climb the outside rail of a curve, then if that rail is worn, that is, beveled out, it becomes a saucer or bowl-like

floor upon which the flange rim rests. Then there is an easy grade for the wheel to mount the rail. The beveled rail need not be worn to the breaking point—it might be perfectly safe on a straight track—it would stand any strain to which it is there subjected—but at a curve it is entirely likely that it acted in the same way that a derailer does to safeguard the main track from a wild car on the siding.

Appellee proves and argues that the more flanges that can be presented against the outer rail, that much less likely will the train be

to leave the track, and in this way, it insists, there was further negligence in continuing to use the "bald" driver. It is undisputed that engines with "bald" drivers and rigid trucks are not now being constructed and have not been for many years, and at the time of this accident, only three of them were left on this road. But the proof of appellant, shows that this change in type of engine—the use of the swinging center-plate instead of the rigid pony truck, and the use of a flanged drive wheel instead of the "bald" driver—has come principally as a larger and heavier type of engines began to be employed.

Its witnesses admit that the rigid truck and the "bald" driver under the modern heavy engines would be dangerous and unsafe, but swear there is nothing dangerous in their use under a lighter engine, like No. 143. They also swear that the worn condition of the rail above referred to is not dangerous. About a year before this, engine No. 143, went into the ditch near Leon Tunnel, and the proof shows on a curved track like that shown at this time. Complaint and criticism was then made by employes to appellant's officials in charge of such equipment that the engine was deficient
299 and dangerous for the reasons above named.

Appellant is frank to say that it cannot account for this derailment, and is unable to offer any explanation of it. It contends that it is merely one of such accidents as are constantly occurring in railroad history, notwithstanding the exercise of great care. It may be true, that this engine No. 143, with the rigid truck and "bald" driver should safely track an eight degree curve if the outside rail be in good condition, but, when a badly worn and beveled rail concurs with the rigid truck and "bald" driver of this engine, it certainly is not an unwarranted deduction to account for the wreck in that way.

The facts going to support appellee's theory of negligence were testified to by numerous witnesses, among them engineers and others experienced in railroading. There is no material dispute as to the rigid pony truck and the worn rails. Appellant's witnesses, however, do controvert the theory of the accident as resulting from these proven facts. While they too, are men of railroad experience and responsibility, yet the conflict as to cause is none the less one of fact, and unless the instructions are erroneous the jury's verdict should not be disturbed. But, before coming to a consideration of the instructions, we will notice appellant's objection made to the introduction of certain evidence.

It is insisted that it was erroneous to permit proof of derailment of this engine at Leon Tunnel before this accident. It argues that this trial was to ascertain the cause of the derailment in which

300 Kelly was killed, and that proof of the Leon Tunnel accident could have no probative effect on this question, but rather tended to inject a collateral issue. Appellant concedes, however, that this testimony might be competent if the conditions under which the several derailments took place were the same. The proof did show that at Leon, there was a curve; the outside rail was worn; and it was this same engine with its rigid truck and "bald" driver

running at about the same speed. These are the elements which appellee contends caused the wreck when Kelly was killed. Appellant has insisted through this trial that such conditions did not cause the derailment. We think it perfectly competent under the circumstances to show that like conditions did produce a like result, and in that way bring home to appellant knowledge of the danger in operating engine No. 143, if the rail is worn at a curve. We are of the opinion that the authorities relied on by appellant in support of its objection are not applicable. *Hughes &c. v. General Electric L. & P. Co.*, 107 Ky., 485, was to recover damages for injury to residence property from the Electric Company's nearby machinery, in the way of cracked plastering, rattling windows and doors and causing the house to vibrate. The court refused to permit proof that other dwellings in the vicinity were similarly affected, because her action was to recover damages for injuries to her house from the operation of the plant—not necessarily negligent—and its effect upon that house and not others was the proper subject for investigation. If in the extraordinary use of one's property, one's neighbor suffers injury to property, he is liable whether or not he knew it was likely to produce such results.

301 Appellant objects also to the line of proof going to show that appellant for several years before the accident had not been purchasing engines with "bald" drivers or rigid trucks. This is not testimony relating to changes made in appellant's track or equipment after the accident and, therefore, the cases of *L. & N. R. v. Morton*, 121 Ky. 398, and *L. & N. v. Stewart*, 131 Ky. 665, are not applicable. It was a subject of legitimate inquiry, whether before the accident these engines were being discarded or had become obsolete, in order to support appellee's theory that appellant knew the danger in their use. It was for the jury to determine, on this question of notice, whether their disuse was because they were unsafe or merely because they were of too light draft.

Appellant complains that the court refused to give its instruction "B" to the effect that the appellant was not negligent if the condition of the rails, the character of the engine truck, and front driving wheels, at the time of the accident, were such as were generally approved with reference to safety by the "expert judgment of men of experience and knowledge in railway construction and engine mechanism". In our opinion, appellant's negligence in this case is not measured so much by the opinion of its experts and employees, as by whether the track and appliances were such as one who is reasonably careful and prudent, would use or maintain under the circumstances of their use. An instruction was given by the court which submitted the question of negligence and ordinary care and prudence as follows:

302 (8) The jury is instructed that a railway company is not an insurer of the safety of its employees, but is bound only to use ordinary care to provide for them a reasonable safe place in which to work, and reasonably safe implements and appliances with which to work.

In this case the jury are instructed to find for the defendant, unless they believe from all the evidence before them, First: that the accident in question was directly and proximately caused by an unsafe condition of the rail over which the engine climbed or by a defective condition of the engine as respects its front driving wheels or the character of its truck, or by a defective condition of the ties at the place of derailment, or by a combination of said conditions, and Secondly: That such of said conditions as may have existed were due to a failure on defendant's part to exercise ordinary care in respect thereof".

Appellant's chief objection is to instructions Nos. 4 and 5, which are as follows:

"(4) If the jury should find for plaintiff, they should fix the damages at such sum as would reasonably compensate the dependent members of the family of said Kelly, if any there be, for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of said Kelly's injury and death. In fixing said amount, the jury are authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, probable duration of life; and also the pecuniary loss, if any, which the jury may find from the evidence that the
303 dependent members of his family, if any, have sustained because of being deprived of such maintenance or support or other pecuniary advantages, if any, which the jury may believe from the evidence they would have derived from his life thereafter."

"(5) If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earning of Mat Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff must be the aggregate of the sum which the jury may find from the evidence and fix as the pecuniary loss as above described, which each dependent member of Mat Kelly's family may have sustained by his death, stating the amount awarded his widow, Addie Kelly, Mat L. Kelly, Ruth Kelly, Thomas J. Kelly and Richard Kelly, if any for them, or any of them, but such findings in the aggregate must not exceed \$32,000.00 Dollars. They will not find any sum for Sylvester Kelly. In other words, if the jury find for the plaintiff, you must in your verdict state also the respective amounts awarded each dependent member of decedent's family, &c."

Appellant insists, under the principles of *Gulf & Colorado Railway Co. v. McGinnis*, 228 U. S. 173,—57 L. Ed. 785, and *Mich. Cent. Co. v. Vreeland*, 227 U. S. 59—57 L. Ed. 417, that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount. In other words, the amount awarded should be such that if placed at interest, — would be wholly consumed when the time of dependency ceased, and that
304 the jury have been so instructed.

In the *McGinnis* case, *supra*, the court construes the Employers' Liability Act to provide compensation to certain surviving relatives of the employee, "for the actual pecuniary loss resulting to

the particular person or persons for whose benefit an action is given". With reference to the apportionment of the benefit of each, the jury must do this, "measured by his or her individual pecuniary loss". We are unable to see that the McGinnis case, *supra*, either in principle or by intimation requires that the measure of damage in the instruction to juries should be any different from the one in this case. In fact, the instructions, as above quoted, seem to have been drawn to conform to the principles announced in the McGinnis case.

The instructions limited recovery to the actual "pecuniary loss." Their whole loss was sustained at the time of his death. There is no more reason in appellant's theory, that the defendants should have discounted the loss, than there is that the Railroad Company should be adjudged to pay a fixed sum annually, semi-annually or monthly for their support. The award of the jury should be for the pecuniary loss suffered. While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average jurymen is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependant is more than ought to be asked of any one less qualified than an actuary. We believe the instructions are not only right in form and in principle, but are in harmony with the McGinnis case.

Appellant also claims that the damages awarded are excessive. This claim goes again to the instructions we have just considered. The argument is based upon the idea that the whole amount which the jury believed was the pecuniary loss, was awarded in a present lump sum for each dependent. It is pure speculation as to how the jury reached the exact figures named in the verdict. They may have felt that the total loss was more than that, and did discount it at its present cash value. The same objection could as well have been made had the verdict been \$15000, or \$10000.

Matt Kelly's life expectancy at the time of his death was 22 years, and he was earning \$192 per month. Mrs. Kelly had a like expectancy. The children were aged as follows: Carroll 16; Matt 12; Ruth 10; Tom 8; (afflicted physically) and Richard 3. When the total sum allowed by the jury is but approximately two-fifths of the gross earnings of Matt Kelly for the probable duration of his life, and in view of the standard of living set by him for his family—the educational advantages which he gave them—we do not believe it can be said that the amount allowed is excessive.

So, *Ry. v. Bennett*, 233 U. S. 80—Adv. Sheet, May 15, 1911.

The judgment of the lower court is, therefore, affirmed.

Shelby, Northcutt & Shelby, Lexington, Ky.; L. Apperson, Mt. Sterling, Ky., for Appellant.

O'Rear & Williams, Frankfort, Ky., for Appellee.

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Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY Appellant,

v.

MATT KELLY'S ADMINISTRATRIX, Appellee.

Petition for Rehearing.

A rehearing of this cause is respectfully asked upon a question, which, although not raised upon the original hearing, is necessarily inherent in the record, and is one of that class which in all cases must be decided by the court if raised at any time before the cause has passed beyond its control. Our only excuse for not presenting it in the first instance is the fact that it was not brought to our attention until after this court had rendered its decision upon this appeal.

The point referred to is that by reason of the provisions of the Seventh Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Montgomery Circuit Court, nor in any way be acquired by that Court.

It will be borne in mind that this action is one arising under the Federal Employers' Liability Act (35 Statutes at Large, 65); that the right asserted in it is one created by and dependent solely upon that Act, the Federal legislation upon the subject of injuries to employes of carriers engaged in interstate commerce having superseded all other. There is no right on account of personal
308 injury which such an employe has against such an employer other than is provided by the Act, nor can any right thereby created be enforced in any other manner than that therein prescribed.

By the sixth section of the Act as amended by the Act of April 5, 1910 (36 Statutes at Large, 291), it is provided that:

"The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States."

The Seventh Amendment to the Federal Constitution provides that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It will, of course, be recognized at once that this Amendment consists of two independent clauses, the first providing for the preservation of the right of trial by jury in all suits at common law where the value in controversy exceeds twenty dollars, and the second providing that after a jury shall have passed upon a question of fact, it shall not be otherwise re-examined in any court of the United States than according to the rules of the common law. It is the first of these clauses with which we have to do here.

The right of trial by jury, which this Amendment declares "shall be preserved," is the right to a trial by a jury of twelve men, whose finding shall be unanimous:
American Publishing Co. v. Fisher, 166 U. S. 464, 41 L. Ed. 1079.

In *Springville City v. Thomas*, 166 U. S. 707, 41 L. Ed. 1173, the Supreme Court, speaking through Mr. Justice Fuller, said:

"In our opinion the 7th Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases; and the Act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

In *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 41 L. Ed. 1, Justice Brewer, speaking for the court, said:

"The 7th Amendment, indeed, does not attempt to regulate matters of pleading or practice. * * * Its aim is not to preserve mere matters of form and procedure, but substance of right."

In the *Fisher* case, *supra*, the same Justice again, speaking for the Court, said (166 U. S. 468, 41 L. Ed. 1081):

"Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

We therefore submit that "the right of trial by jury" (that is, a trial by a jury of twelve, whose verdict shall be unanimous), which the Seventh Amendment declares "shall be preserved," necessarily inheres in every cause of action created by or originating under an Act of Congress; and that the Congress can not confer upon any court, nor can any court otherwise obtain jurisdiction to try such causes of action, unless it be so constituted as to afford the trial required by the Seventh Amendment.

Now the Constitution of Kentucky, Section 248, provides that: "The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel;" and Section 2268, Kentucky Statutes, which carried into effect the above constitutional provision, provides that,

"In all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

Neither Section 248, of the Constitution of Kentucky, nor the above legislation passed in pursuance thereof, are forbidden by the first clause of the Seventh Amendment to the Federal Constitution, which is a limitation upon the power of Congress and not a limitation upon the legislative power of the State, and the State legislation upon this subject being entirely valid as to procedure in its courts, it is clear that no circuit court in Kentucky can enforce the

common-law requirement as to a unanimous verdict by twelve men,
or can refuse to receive a verdict rendered by nine, which is
311 not amenable to some other legal objection.

Now in all cases where the Congress can confer concurrent jurisdiction upon State and Federal courts, it can, if it see fit, confer the jurisdiction exclusively upon the State courts. The right of trial by jury, however, as that term is used in the Seventh Amendment, is one which Congress may not take away or even abridge; but if it could create rights and liabilities and commit their enforcement exclusively to courts powerless to enforce the constitutional mandate as to mode of trial, then a right secured to a litigant by the Federal Constitution would be held at the mere will of the Federal legislation; a conclusion, which, of course, is absurd.

It would seem, therefore, to follow that the courts of a State which are powerless to satisfy the requirements of the Seventh Amendment can not entertain jurisdiction of a cause of action created by, and wholly dependent upon, an Act of Congress; they can not acquire jurisdiction of the "subject-matter of the action."

Indeed, it is fairly questionable whether it was intended by Congress to confer jurisdiction upon such courts. The Amendment to Section 6 of the Employers' Liability Act is as follows (*italics ours*):

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no cases arising under this Act and brought in any State court of *competent* jurisdiction shall be removed to any court of the United States."

312 And in Section 28 of the Act of March 3, 1911, known as the Judicial Code, it is again provided that no case arising under the Employers' Liability Act

"Brought in any State court of competent jurisdiction shall be removed to any court of the United States."

This language in both statutes seems to imply a purpose to confine the jurisdiction, as to the State courts, to those of "competent jurisdiction" only; and, as we have seen, no court can be said to be "competent" for the adjudication of a purely Federal right of liability which is not equipped with the power to afford the kind of trial required by the Federal Constitution.

The point here presented has never been decided, so far as we are advised, by any Federal Court of appellate jurisdiction, nor by any State court of last resort, except the Supreme Court of Minnesota, which, in *Winters v. M. & St. L. R. Co.*, 148 N. W. 106, ruled contrary to the position here taken. In *Gibson v. B. & N. R'y Co.*, 213 Fed. 488, the ruling of the Federal District Court for the State of Washington was also contrary to our contention. These decisions are, of course, not binding on this court, which must decide the question for itself, and, if the line of reasoning we have here outlined be sound, should equally of course, not be followed.

313 The argument may be thus consisely summarized: The Seventh Amendment provides for the preservation of the right of trial in common law cases by the unanimous verdict of a jury of twelve; this is not a mere matter of procedure or form, but, as declared by the Supreme Court in *Walker v. N. M. & S. P. R. Co.*, supra, one of "substance of right;" while this is not a limitation upon the power of the States, it is a limitation upon the power of the Federal Government to provide any other mode of trial for such cases; if Congress can create rights and impose liabilities which, by reason of their nature must be enforced by "suits at common law," and provide for their adjudication otherwise than by "trial by jury," it can set aside at pleasure the constitutional requirements, which is absurd; and if it undertakes to commit the adjudication of such rights and liabilities to tribunals which are organically incapable of affording such jury trial, such undertaking does involve an attempt to provide another mode of trial than that required by the Federal Constitution. The court, therefore, should not, unless compelled by necessary principles of statutory construction, interpret the Congressional legislation in question as intending to commit to those State courts, which are unable to satisfy the requirements of the Seventh Amendment, the adjudication of the rights created, and the liabilities imposed, by it; but if it be necessary to construe it as evidencing such purpose, the legislation should, in that particular, be declared unconstitutional and void.

314 We deem it unnecessary to argue the proposition that this question of jurisdiction of the subject-matter is one that cannot be waived, but, until the final disposition of the cause, may at any time be raised by the parties and should be raised by the court itself whenever presented to its notice. See:

Ormsby v. Lynch, Litt. Sel. Cases, 307.

Lindsey v. McClelland, 1 Bibb, 263.

Fidler v. Hall, 2 Met. 461, 463.

Davidson v. Johnson, 113 Ky. 210.

Mansfield C. & L. M. R'y v. Swan, 111 U. S. 379, 382, 28 L. Ed. 462, 464.

Metcalf v. City of Watertown, 128 U. S. 586, 587, 32 L. Ed. 543.

We ask that a rehearing be granted; that the judgment appealed from be reversed, and, as was done in *Fidler v. Hall*, supra, that the cause be remanded with a direction to the Montgomery Circuit Court to dismiss the action.

Respectfully submitted,

SHELBY, NORTHCUTT & SHELBY,

For Appellant.

LEWIS APPERSON,
Of Counsel.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
 vs.
 MAT KELLEY'S ADM'R'X, Appellee.

Appellee's Response to Petition for Rehearing

Appellant's belated discovery of the new question raised in the petition seems to us to have more of the tone of despair than of hope. As one condemned is brought to a full realization of his condition, he turns with what kind of heart we cannot know, to the Scriptures for consolation, preferable to the hopeful spectacle of the tragic event of the crucifixion: So the litigant who has unavailingly exhausted all other resources of the law, turns to the Constitution of the United States.

In this instance it is the 7th Amendment that revives the dying flame. That it has no applicability to the case at bar, takes nothing from its utility in such an argument.

Its history would seem to have saved it from such use as is attempted to put it to here. It will be remembered that the original Constitution contained no guaranty of right of trial by jury in civil cases. Much alarm was occasioned by the omission. In it was seen a tendency to abrogate one of the chiefest, if not the chief corner stone of liberty—the great paladium of the Englishman's rights. It was not contemplated by the American people in setting up an independent government to abandon anything which they already had that was of tried and proven value. Hence, early after the Constitution was ratified by the States, among the first set of amendments which it was thought were necessary to perfect that instrument, the 7th was included. It reads:

"In suits at common law when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the Common law."

It has been repeatedly held, and consistently so, that the foregoing Amendment affects only trials in the United States Courts.

Pearson v. Yewdell, 95 U. S. 294.

Ohio v. Dollison, 194 U. S. 447.

Bolln v. Nebraska, 176 U. S. 87, affirming 51 Neb. 581.

Brown v. New Jersey, 175 U. S. 174.

Brown v. Walker, 161 U. S. 606.

Monongahela Nav. Co. v. U. S. 148 U. S. 324.

McElvaine v. Bush, 142 U. S. 158.

Eilenbecker v. Plymouth County, 134 U. S. 34.

Spies v. Illinois, 123 U. S. 131.

Walker v. Sanvinet, 92 U. S. 93.

Edwards v. Elliott, 21 Wall. 552.

Justices v. Murray, 9 Wall. 227.

Fox v. Ohio, 5 How. 410.

Barron v. Baltimore, 7 Pet. 243.

Livingstone v. Moore, 7 Pet. 551.

Also there — a number of Federal Circuit Court decisions, and a great many State Court decisions to the same effect.

317 In the same authorities is found the declaration that the 7th Amendment to the Federal Constitution does not prohibit a state from changing the ancient number constituting the jury, or from allowing majority verdicts, or from abolishing jury trials altogether in their jurisdictions. Nor do the cases cited by appellant constitute even an exception to the harmonious application of the rule above stated.

American Pub. Co. v. Fisher, 166 U. S. 464; Springville City v. Thomas, 166 U. S. 707 and Walker v. New Mexico & S. P. R. R. Co., 165 U. S. 593, were all cases arising under the laws of certain territories of the United States—Iowa, Utah and New Mexico. The Supreme Court held that as the territorial Courts were United States Courts, it was not competent for the local legislatures to provide a different kind of jury for their United States than was required by the Constitution of the United States for all its Courts.

Appellant endeavors to work out a connection between the State Circuit Court and the Federal Constitution, by which the State Court is made into a Federal tribunal, upon the idea that Congress, in the Employers' Liability Act, has conferred or attempted to confer jurisdiction upon the State Courts in cases arising under the Act.

But the assumption is incorrect, and the deductions based even upon the assumption are unsound.

Congress has not conferred, nor has it attempted to confer jurisdiction upon the State Courts by the Act.

It has conferred jurisdiction—concurrent jurisdiction—upon the United States Courts, but not exclusive jurisdiction.

318 The Constitution and laws of the United States are laws binding also upon the several States and their citizens and Courts, wherein they create rights. Those rights adhere to the citizen, and unless exclusive jurisdiction is created by Congress to enforce the right, it may be enforced in any judicial forum having the proper parties before it, and clothed by its sovereignty to determine such a cause. Just as the law of the State may be enforced in the Courts of the United States, in cases where Congress has created a jurisdiction suitable to such cases, and just as rights arising under the laws of Tennessee, for example, may be enforced in Courts of Kentucky, when the latter have jurisdiction of the parties, and the action is transitory. Just as rights created under the laws of England may be enforced by the Courts of Kentucky, the latter having before it the necessary parties and the action being ambulatory. In none of these instances do the sovereignties creating the right, confer jurisdiction extra-territorially, nor could they. Neither the Act of Parliament, nor the Statute of Tennessee, nor the Act of Congress confer jurisdiction on the Kentucky Courts. Nor do the State Leg-

islatures in creating legal rights confer jurisdiction on the Federal Courts.

To illustrate: copyrights are created by laws of the United States. Rights arising under the National Banking Act are likewise created by Congress. Yet the State Courts enforce them in the latter cases exclusively so far as their Federal creation are concerned.

The Interstate Commerce legislation of Congress covers a wide and constantly widening field. Among its many provisions creating entirely new rights and personal liabilities are the Safety Appliance Acts and the Amendment of 1906 known as the Carmack Act.

319 Under the latter, at least in three cases in Kentucky it has been held that the State Court could enforce such rights.

C. N. O. & T. P. Ry. Co. v. Gregg, 80 S. W. 512, 25 Ky. Law Rep. 2329 (not officially reported.)

Illinois Central R. R. Co. v. Curry, 127 Ky. 643.

Illinois Central R. R. Co. v. Eblin, 114 Ky. 817.

Also see McElvain v. St. L. & S. F. R. Co. (Mo.) 131 S. W. 736. Hutchinson on Carriers, sec. 634.

Reciprocally, it is held that rights created by a State, even as to equity practice, in the State Courts, may be enforced in the Federal Courts. (Greely v. Lowe, 155 U. S. 75.)

Nor does the Federal Employers' Liability Act purport to create jurisdiction in the State Courts to try civil cases between private individuals, arising under the Act.

The Act says:

"Under this Act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant may be doing business at the time of the commencement of such action. The jurisdiction of the Courts of the United States under this Act shall be concurrent with that of the Courts of the several States, and no cases arising under this Act and brought in any State Court of competent jurisdiction shall be moved to any Court of the United States."

Thus we see that Congress instead of conferring jurisdiction on the State Courts, recognized that they already had, or would have such jurisdiction without express Federal consent. The clause quoted—The Paynter Amendment—was aimed as a limitation upon the jurisdiction of the Federal Courts.

320 It was so held by the United States District Court for the Eastern District of Kentucky in this identical case, on a motion to remand it to the State Court, whence it had been removed by the appellant. (C. & O. v. Kelly, 201 Fed. 602.)

The phrase "any State Court of competent jurisdiction" could only mean such State Court as was competent under the laws of the State conferring jurisdiction upon its Courts, to entertain a suit involving the amount sued for in such transitory action.

The language quoted from this Act is almost identical with that

creating jurisdiction formerly in the United States Circuit Courts—now in the United States District Court, Sec. 1 of the Act of 1875 (Ch. 137, 18 Stat. L. 470) reads:

"The Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there may be a controversy between citizens of different states" &c.

No one has ever thought, much less has any one felt himself in such extremity as to argue, that this section created a jurisdiction in the State Courts, making them United States Courts, where the practice is regulated by Congress, or by the rules adopted under the Federal Constitution by the Supreme Court.

321 Lastly, the argument that appellant's right of trial by a jury composed as at the ancient common law, and a unanimous delivery by them, have been denied to it in this case, falls flat here, because it was tried by such a jury, and the verdict was unanimous.

Respectfully submitted,

O'REAR & WILLIAMS,
Counsel for Appellee.

322 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,

v.

MATT KELLY'S ADMINISTRATRIX, Appellee.

Appellant's Reply to Appellee's Response to the Petition for Rehearing.

1. It is undoubtedly true that the Seventh Amendment does not operate as a limitation upon the powers of the States. This principle so earnestly insisted upon in appellee's response is expressly admitted in our petition for rehearing (pp. 4-5.) We submit, however, that counsel for appellee state the doctrine entirely too narrowly when they say on page 2 of their response that the Amendment "affects only trials in the United States courts." It operates not only upon the courts of the Federal Government, but upon the Federal Government as a whole and limits its legislative power as well as its judicial procedure. All of the first ten amendments to the Federal Constitution have been repeatedly recognized as limitations not upon the powers of the State, but upon those of the National Government. Take for instance, the following from the line of cases cited by the appellee: In the Barron case, Chief Justice Marshall speaking of the Fifth Amendment, says (7 Peters, 250-1) that it "is intended solely as a limitation on the exercise of power by the government of the United States and is not applicable to the

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legislation of the States;" in *Ex Parte Spies*, Chief Justice Waite says (123 U. S. 166, 31 L. Ed., 86) that "the first ten Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone;" in the *McElvaine* case, Chief Justice Fuller said (142 U. S. 158, 35 L. Ed. 973) "the first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal government only;" in *Brown v. New Jersey*, it was declared (175 U. S. 174, 44 L. Ed. 120) that "the first ten amendments to the Federal Constitution were intended to operate solely on the Federal government"; in *Ohio v. Dollison*, in speaking of the first eight amendments, it was said (194 U. S. 447, 48 L. Ed. 1035) that they "have reference to powers exercised by the government of the United States and not to those of the States"; while in the *Ellenbecker* case, (134 U. S. 34, 33 L. Ed. 803), the same language substantially was used, the court declaring, through Mr. Justice Miller, that the limitations of the fifth, sixth, and eighth amendments were intended "exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as limitations upon the powers of the States."

324 These authorities clearly show that the distinction is one between the "government" in the respective States and the National "Government" and not merely the National Courts; a difference quite important in the consideration of the question now in hand.

2. Our Petition for Rehearing cites (p. 3) the *Walker* case (165 U. S. 593), which went to the Supreme Court from the territorial courts of New Mexico, and the *Fisher* and *Thomas* cases, which went from the territorial courts of Utah. These cases were cited to show that jury trials in the territorial courts were controlled by the provisions of the Seventh Amendment. It is argued in the Response to the Petition for Rehearing that the citation of these cases upon this proposition is inapt upon the ground that the courts of these territories were courts of the United States, and as such subject to the limitations of the Amendment. No proposition, however, is better settled than that the territorial courts were not courts of the United States or subject to the constitutional limitations imposed upon such courts. In *Clinton v. Englebrecht*, 13 Wall., 434, 447, decided on error to the Supreme Court of the Territory of Utah, it was held, upon the express ground that the territorial courts were not courts of the United States, that the mode of summoning jurors in the courts of Utah was regulated by the law of that territory and not by the practice obtaining in the United States Courts, the opinion pointing out that the fact that territorial courts were not courts of the

United States was settled by the decision rendered in 1828 in 325 *American Ins. Co. v. Canter*, 1 Peters, 540, 546. The decision, therefore, in the *Englebrecht* case involved the nature of the territorial courts, from which both the *Fisher* case and the *Thomas* case went to the Supreme Court. In the later case of *McAllister v. United States*, after a review of the authorities bearing

upon the nature of the territorial courts, the Supreme Court said (141 U. S. 184, 35 L. Ed. 696): "These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories, created under the plenary municipal authority that Congress possesses over the Territories of the United States, are not courts of the United States created under the authority conferred by that article." Counsel for appellee, are therefore, inadvertently in error when they say (*italics ours*) that in the Fisher, Thomas and Walker cases "the Supreme Court held that *as the territorial Courts were United States Courts*, it was not competent for the local legislatures to provide a different kind of jury for their United States Courts than was required by the Constitution of the United States for all its Courts." Upon the contrary, the ground of the decision in both the Fisher and Thomas cases was that it was not competent for the territorial legislature, deriving its powers from an Act of Congress, to provide for a different mode of trial than that prescribed by the Federal Constitution; and the same principle is recognized in the Walker case.

326 3. Counsel for appellee are right in their contention that as a general proposition, it is not necessary that jurisdiction be "conferred" upon the State courts by the Federal authority in order to enable them to take cognizance of cases arising under an Act of Congress. Unless such jurisdiction be denied to them by the Federal authority, they may and must enforce rights and liabilities created by Congressional action in all cases where they inherently have jurisdiction of the subject matter. But it is equally true that the attempt to adjudicate cases arising solely under an Act of Congress may be withheld from the State Courts, and this may be done by an exclusion of such jurisdiction either by express Congressional enactment or by a necessarily implied prohibition by the Federal Constitution.

Now the basic proposition of the Petition for Rehearing is this: That it is not competent for Congress, which in everything acts under the limitations of the Constitution, to create rights and even expressly to commit their adjudication to tribunals impotent to conserve the right of jury trial secured by the Seventh Amendment; nor can it in such cases by failing expressly to withhold jurisdiction from such tribunals enable them to take to themselves the enforcement of rights and liabilities derived from or imposed by the Constitution of the United States. And this proposition at last rests upon the elemental principle that every right or liability created by Congress must find its sanction in and be derived from that instrument; and that there is inherent in every such right or liability the limitation that it must be enforced in accordance with the Constitutional requirements. If then this be true, the jurisdiction of such State tribunals as cannot afford a trial in conformity with those requirements must be regarded as denied by the Constitution itself.

327 If this be not so it would follow, as pointed out in the Petition for Rehearing (page 5), that Congress, as to rights

created by it, might evade the provisions of the Constitution by committing exclusive jurisdiction thereof to State tribunals unable to conserve the right of trial by jury secured by the fundamental law.

4. It is proper to point out that in none of the Kentucky cases referred to in appellee's Response as holding that our State courts can enforce rights created by Congressional legislation was the question here presented for consideration.

5. The suggestion made by counsel at the conclusion of their Response that our argument "falls flat here" because the verdict rendered was unanimous would hardly seem to require further notice than to call attention to the fact that the question here under consideration is, whether the Montgomery circuit court had jurisdiction of the subject matter of this action. If it had not jurisdiction to act in the case at all, it is impossible to understand how the fact that action of a certain kind was had can affect the question. When the court is wholly without jurisdiction of a case, all proceedings before it are coram non judio; and it is certainly a novel idea that the want of power to act at all can be cured by the fact that, in the course of those non judicial proceedings, certain required forms of law were observed.

Respectfully submitted,

SHELBY, NORTHCUTT &
SHELBY,

For Appellant.

LEWIS APPERSON,
Of Counsel.

328 Afterwards, on the 15th. day of December, 1914, the following order was entered herein, to-wit:

The Court being sufficiently advised, delivered a response, and ordered that the petition for rehearing be, and the same is, now overruled.

329 Court of Appeals of Kentucky, December 15, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.

MAT KELLY'S ADMINISTRATRIX, Appellee.

Appeal from Montgomery Circuit Court.

Response to Petition for a Rehearing by Judge Carroll.

Counsel for appellant, in a petition for a rehearing, present for the first time the argument that the judgment below should be reversed because the Montgomery circuit court had no jurisdiction to entertain or determine the action.

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy

shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules
 330 at the common law." And it has been uniformly held by the Supreme Court of the United States that the jury trial contemplated by this section is the right to a trial by a jury of twelve men whose finding shall be unanimous:

American Publishing Co. v. Fisher, 166 U. S., 464, 41 L. Ed., 1079;

Thompson v. Utah, 170 U. S., 343, 42 L. Ed., 1061;

Black v. Jackson, 177 U. S., 349; 44 L. Ed., 801.

Section 248 of the Constitution of this State reads in part: "The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

Section 2268 of the Kentucky Statutes, enacted pursuant to this constitutional provision, provides: "That in all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Section six, as amended in 1910, of the Federal Employers' Liability Act, provides that "Under this act an action may be brought in a circuit court of the United States in the district of the
 331 residence of the defendant, or in which the cause of action arose, or in which defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no cases arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

The argument against the jurisdiction of the Montgomery circuit court is this: It is said that Congress did not have power to confer or commit jurisdiction of cases arising under the Federal Employers' Liability Act to the courts of any state that does not recognize the binding necessity for a jury of twelve and a unanimous verdict, or that has by its Constitution and laws taken from its courts the authority to require a unanimous verdict of such a jury, because under the seventh amendment it is indispensable that every court that hears and determines a common law case arising under congressional legislation shall have the power to require a jury of twelve and a unanimous verdict, which power is denied to the courts of this State by the Constitution and Statutes of the State.

It will, however, be observed that this congressional legislation does not confer jurisdiction on State courts to hear and determine cases arising under the Act; it merely recognized the existing jurisdiction of state courts, and to make plain this jurisdiction the Act provides that "no cases arising under this Act and brought in any

State court of competent jurisdiction shall be removed to
 332 any court of the United States.

It is further well established that State courts may take jurisdiction to enforce civil rights and liabilities arising under congressional legislation unless there be something in the congressional legislation forbidding the state courts to take jurisdiction of cases arising under it. Thus it was said in *Claffin v. Houseman*, 93 U. S., 130, 23 L. Ed., 833: "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. * * * If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws."

333 In *L. & N. R. R. Co. v. Scott*, 133 Ky., 724, the suit was brought in the state court against the railroad company to recover damages under the congressional legislation known as the Carmack Amendment to the Interstate Commerce Act, and in holding that the state court had jurisdiction to enforce the provisions of this act, we said:

"The acts of Congress within the sphere of its jurisdiction are the law of the land no less than the acts of the State Legislature within the sphere of its jurisdiction, and as the court must take judicial notice of these laws, and as facts of which it must take judicial notice, by the Code, need not be stated in the pleadings, it was unnecessary for the plaintiff to refer to the United States Statute in his petition. Accordingly, we have uniformly given judgment against carriers where they had in shipping stock from one state to another failed to water the stock, as required by the act of Congress, without any reference in the pleadings to that act." This case was affirmed by the Supreme Court of the United States in *L. & N. v. Scott*, 219 U. S. 209, 55 L. Ed., 183.

Speaking of the Federal Employers' Liability Act in *Mondou v. N. Y. N. Y. & H. Railroad Co.*, 223 U. S., 1, 56 L. Ed., 327, the Supreme Court said, in reference to the action of the Connecticut court in declining to take jurisdiction of cases arising under the act,

334 that "there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed, by local laws, is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. * * * We con-

clude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

In as much then as state courts, as a matter of right independent of congressional sanction, have jurisdiction to enforce civil rights and remedies created by congressional legislation unless the right is denied by the legislation, it is difficult to understand upon what ground the assertion can be soundly rested that the seventh amendment controls jury trials in State courts in the face of the often-repeated declaration of the Supreme Court that this amendment affects only trials in courts of the United States. *Maxwell v. Dow*, 176 U. S., 581, 44 L. Ed., 597; *Edwards v. Elliott*, 21 Wall, 532, 22 L. Ed., 487; *Bolln v. Nebraska*, 176 U. S., 83, 44 L. Ed., 382; *Twitchell v. Pennsylvania*, 7 Wall, 321, 19 L. Ed., 223; *Walker v. Sauvinet* 92 U. S., 90, 23 L. Ed., 678.

335 It seems to us that, when state courts are given jurisdiction to hear and determine causes of action created by Federal legislation, they may exercise this jurisdiction according to the practice and procedure of the forum and under the jury system adopted subject of course to such conditions as Congress may attach to the legislation; and Congress did not in the legislation here in question attempt to attach any conditions to the practice and procedure through which the jurisdiction of state courts of competent jurisdiction might be exercised in the enforcement of rights arising under this Act. *Gibson v. Bellingham & N. Ry. Co.*, 213 Fed., 488; *Winters v. Minneapolis & St. L. R. R. Co.*, Minn., 148 N. W. 146.

It might be added that as it appears from the record that there was in this case a jury of twelve and a unanimous verdict, it may seriously be questioned if the appellant has the right to raise the constitutional question we have discussed. But, in order to remove any doubt of the right of appellant to avail itself on appeal of an adverse ruling on the subject presented in the petition for a rehearing, we have stated our views at some length.

The petition for a rehearing is overruled.

Shelby, Northcutt & Shelby, Lexington, Ky., L. Apperson, Mt. Sterling, Ky., for Appellant.

O'Rear & Williams, Frankfort, Ky., for Appellee.

336 Court of Appeals of the State of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,

vs.

ADDIE KELLY, as Administratrix of Matt Kelly, Deceased, Appellee.

Petition for Writ of Error.

The petitioner, The Chesapeake and Ohio Railway Company, appellant herein, hereby sets forth that on or about the 15th day of October, 1914, the Court of Appeals of the State of Kentucky made

and entered an order and judgment herein in favor of the appellee, Addie Kelly, as Administratrix of Matt Kelly, deceased, and against said petitioner, the appellant; that afterwards, and within the time allowed by the law of the State of Kentucky, appellant filed a petition for a rehearing in said cause, and thereby, and under the laws of the State of Kentucky and the rules of said court, the said order and judgment was suspended and did not become final until the Court of Appeals acted upon said petition for a rehearing; that afterwards on the 15th day of December, 1914, the said petition for a rehearing was overruled by said Court of Appeals, and its said judgment and order, made, as aforesaid, on or about the 15th day of October, 1914, became final and the mandate of said Court of Appeals was, upon said day, duly issued thereon; that in said order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition:

That the said Court of Appeals of the State of Kentucky is the highest court of the said State of Kentucky in which a decision in this suit and this matter could be had.

Wherefore, said petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of the State of Kentucky for the correction
337 of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 15th day of December, A. D. 1914.

SHELBY, NORTHCUTT &
SHELBY.
LEWIS APPERSON.

Attorneys for said Petitioners.

The writ of error as prayed for in the foregoing petition is hereby allowed this 15th day of December, A. D. 1914; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Thirty thousand dollars.

Dated at Frankfort, Kentucky, this 15th day of December, A. D. 1914.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed in my office this 15th day of December, A. D. 1914.

ROBT. L. GREENE,
Clerk of the Court of Appeals of Kentucky.

[Endorsed:] The C. & O. Ry. Co. v. Matt Kelly's Admrx. Petition for writ of error.

338 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Chesapeake and Ohio Railway Company, Appellant, and Addie Kelly, as Administratrix of Matt Kelly, deceased, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of The Chesapeake and Ohio Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment

339 be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of January, 1915, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States, for the Eastern District of Kentucky, at Frankfort, this the 15th day of December, A. D. 1914.

[Seal United States of America, Eastern Kty. Dist. Court.]

J. W. MENZIES,
Clerk of the said District Court,
By M. S. BARRETT, D. C.

Allowed by

J. P. HOBSON,

Chief Justice of the Court of Appeals of Kentucky.

[Endorsement:] The C. & O. Ry. Co. vs. Addie Kelly, Admrx. of Matt. Kelly. Writ of error. 1914, Dec. 15, filed. Att.: Robt. L. Greene, C. C. A.

340 Court of Appeals of the State of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
ADDIE KELLY, as Administratrix of Matt Kelly, Deceased, Appellee.

Assignment of Errors.

Now comes the said appellant, the plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky in the above entitled cause there is manifest error in this, to wit:

1. The said Court erred in holding and deciding that the Montgomery Circuit Court, from whose judgment this appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to said Montgomery Circuit Court with directions to dismiss the same.

2. The said Court erred in holding and deciding that said Montgomery Circuit Court had committed no error in giving to the jury Instruction No. 2, which was in words and figures as follows:

"If the jury believe from the evidence that the defendant negligently suffered its engine, appliances, track or roadbed, to be defective or insufficient, and that defendant knew, or by the exercise of ordinary care should have known of such defect or insufficiency, if any existed, in time by the exercise of ordinary care to have avoided injury to said Mat Kelly and failed before his injury to remedy the defect or insufficiency, if any, and that as a direct result of said negligence and failure, if any there was, said Kelly received the injury which caused his death, then the jury should find for plaintiff.

If the jury do not so believe and find, they will find for the defendant;" said Instruction being erroneous in that it did not require the jury to believe, by a fair preponderance of the evidence, the facts upon which the liability of the defendant was, by said Instruction 341 predicated.

3. The said Court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in giving to the jury Instructions No. 4 and No. 5, which were in words and figures as follows:

"(4) If the jury should find for plaintiff, they should fix the damages at such sum as would reasonably compensate the dependent members of the family of said Kelly, if any there be, for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of said Kelly's injury and death. In fixing said amount, the jury are authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, probable duration of life; and also the pecuniary loss, if any, which the jury may find from the evidence that the dependent members of his family, if any, have sustained because of being de-

prived of such maintenance or support or other pecuniary advantages, if any, which the jury may believe from the evidence they would have derived from his life thereafter”.

“(5) If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant, which must not exceed the probable earnings of Mat Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sum which the jury may find from the evidence and fix as the pecuniary loss as above described, which each dependent member of Mat Kelly’s family may have sustained by his death, stating the amount awarded his widow, Addie Kelly, if any, and his infant children, Carroll Kelly, Mat L. Kelly, Ruth Kelly, Thomas J. Kelly and Richard Kelly, if any for them, or any of them, but such findings in the aggregate must not exceed \$32,000.00 *Dollars*. They will not find any sum for Sylvester Kelly. In other words, if the jury find for the plaintiff, you must in your verdict state also the respective amounts awarded each dependent member of decedent’s family.

If the jury believe from the evidence that the said family of Mat Kelly had and have any other income than from the earning capacity of Mat Kelly, they should take into consideration and deduct such income, if any, and as to the infants said recovery must be limited to their infancy or until they arrive at the age of twenty-one years.

And as to Mrs. Addie Kelly, the jury should, if they find anything for her, limit such recovery to the period of her dependence, and in no event for a longer period than her husband Mat Kelly would probably have lived;” said Instructions being erroneous for the following reasons:

(a) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts such as the decedent’s age, habits, business ability, earning capacity and probable duration of life, all of which went to enhance the amount of damage, they were not told that they might take into consideration

his health, his physical condition, and the hazardous nature
342 of the employment in which he was engaged, which were circumstances tending to decrease the estimate of damage;

(b) Said Instructions do not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependents from a continuance of the life of the decedent, but permit the jury to estimate such pecuniary advantage as being equal to the probable earnings of said decedent during the whole period of his life expectancy;

(c) Said Instructions do not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance;

(d) Said Instructions do not confine the reasonable expectancy of pecuniary advantage to the infant children of said Mat Kelly for which recovery might be allowed to the period of their dependency, nor, indeed, to the period of their infancy, and do not confine the

reasonable expectation of pecuniary advantage to the widow of said decedent to the probable period of her widowhood.

4. The said Court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in refusing, upon defendant's request, to modify the foregoing Instruction No. 4 that the jury, in estimating the damages to be allowed to the widow and infant children, should take into consideration the decedent's health and physical condition and the hazardous nature of the employment in which he was engaged.

5. The said Court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in refusing to give, at defendant's request, the Instruction marked B, which was

in words and figures as follows:

343 "B. If the condition of the rails at the place of the accident and the character of the engine truck and front driving wheels were such as were, at the time of the accident, generally approved as respects safety by the expert judgment of men of experience and knowledge in railway construction and engine mechanism, the jury are instructed that it was not negligence on defendant's part to use the same, and they should find for defendant."

6. The said Court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in refusing to give, at defendant's request, the instruction marked D, which was in words and figures, as follows:

"D. If the jury find for the plaintiff they will fix the damages at that sum which represents the present cash value of the reasonable expectation of pecuniary advantage to the infant children of said Mat Kelly from the continuance of the life of the decedent Mat Kelly; said sum to embrace only pecuniary advantage to said Addie Kelly during her widowhood and while dependent and pecuniary advantage to said infant children while dependent and until they became twenty-one years of age, and they will apportion the amount so found among said widow and dependent infant children.

In fixing the amount of said damages, if any, the jury cannot award any sum on account of Sylvester Kelly, and cannot award any amount on account of the widow and infant children of said Mat Kelly in excess of the reasonable expectation of pecuniary advantage to said widow and infant children on account of their dependency, if any, and the amount of any pecuniary advantage should be diminished by the amount of whatever income and earning capacity, if any, said widow and infant children have during their periods of partial dependency, if any. In other words, no award of damages can be made to said widow and infant children except to compensate them for any sum they might need and might reasonably expect from said Mat Kelly on account of their dependency over and above their income and earning capacity."

Wherefore, the said appellant, plaintiff in error, prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky, and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Court of Appeals of the State of

Kentucky, and order and direct that the said cause be remanded to the Montgomery Circuit Court of said State of Kentucky with directions to dismiss said action and to grant to the plaintiff in error all such other relief as may be proper.

344 Dated this 15th day of December, A. D. 1914.

SHELBY, NORTHCUTT & SHELBY,
LEWIS APPERSON,

Attorneys for said Plaintiff in Error.

345 Court of Appeals of the State of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
vs.

ADDIE KELLY, as Administratrix of Matt Kelly, Deceased, Appellee.

Bond.

Know all men by these presents: That we, The Chesapeake and Ohio Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto Addie Kelly, as Administratrix of Matt Kelly, deceased, in the sum of thirty thousand Dollars to be paid to the said obligee, her successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

In testimony whereof we have hereunto subscribed our names and affixed our seals this 15th day of December, A. D. 1914.

Whereas the above named, The Chesapeake and Ohio Railway Company, hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, but otherwise to remain in full force and effect.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

By R. L. NORTHCUTT, *Attorney.*

346 [SEAL.] NATIONAL SURETY COMPANY
OF NEW YORK,

By EUGENE E. HOGE, *Attorney in Fact.*
ELI H. BROWN, JR.,

*Consulting Atty. for National Surety
Co. of N. Y.*

I hereby approve the foregoing bond and surety this 15th day of of November, A. D. 1914.

J. P. HOBSON,
*Chief Justice of the Court of Appeals
of Kentucky.*

347 Form 201. Ky. 500. 11-1913.

Know all men by these presents, that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed, and does by these presents, make, constitute and appoint Eugene Hoge, Frankfort, Kentucky, its true and lawful Attorney-in-fact, with full power and authority hereby conferred in its name, place and stead, to sign, execute, acknowledge and deliver, a bond or undertaking as follows: As Surety for Chesapeake and Ohio Railway Company required by law to prosecute a Writ of Error to the Supreme Court of the United States from the judgment of the Court of Appeals of Kentucky rendered Oct. 15, 1914, in the sum of \$30,000.00 interest, etc., in favor of Addie Kelly, Administratrix of the estate of Matt Kelly, deceased, and to bind the National Surety Company, thereby as fully and to the same extent as if such bond were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney-in-fact pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following resolution adopted by the Executive Committee of the Board of Directors of the National Surety Company at a meeting duly called and held on the twentieth day of November, 1913:

"Resolved, That one of the Resident Vice-Presidents, and one of the Resident Assistant Secretaries of this Company, at Louisville, in the State of Kentucky, be and they are hereby authorized and empowered to make, execute and deliver, in behalf of this Company, unto such person or persons in the State of Kentucky, as they may select, its power of attorney constituting and appointing each such person its Attorney-in-fact, with full power and authority to make, execute, and deliver, for it, and in its name and in its behalf, as surety, any particular bond or undertaking that may be required in the said State of Kentucky, the nature of such bond or undertaking to be in each instance specified in the Power of Attorney."

348 In witness whereof, the National Surety Company has caused these presents to be signed by its Resident Vice-President, at Louisville, Kentucky, and its corporate seal to be hereto affixed, duly attested by its Resident Assistant Secretary, at Louisville, Kentucky, this 15th. day of December, A. D. 1914.

NATIONAL SURETY COMPANY,
By J. MORTON MORRIS,
Resident Vice-President.

Attest:

N. M. BRADFORD,
Resident Assistant Secretary.

STATE OF KENTUCKY,
County of Jefferson, ss:

On this day personally appeared before me, a Notary Public, in and for the County aforesaid J. Morton Morris and N. M. Bradford, both being duly sworn by me, did depose and say that they are respectively a Resident Vice-President and a Resident Assistant Secretary, at the City of Louisville, of the National Surety Company; and they, as such Resident Vice-President and Resident Assistant Secretary, respectively, did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of the National Surety Company.

Witness my hand and seal, this 15th. day of December, 1914.

[SEAL.]

E. B. KERR,

Notary Public, Jefferson County, Kentucky.

My Commission expires, January 13, 1918.

49 UNITED STATES OF AMERICA, ss:

to Addie Kelly, as Administratrix of Matt Kelly, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of the State of Kentucky, wherein The Chesapeake and Ohio Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 15th day of December, in the year of our Lord one thousand nine hundred and fourteen.

J. P. HOBSON,

Chief Justice of the Court of Appeals of Kentucky.

Attest:

ROBT. L. GREENE,

Clerk Court of Appeals of Kentucky.

Copy of the above citation received, and service of said citation hereby acknowledged this — day of November, A. D. 1914.

Attorneys for Defendant in Error.

Executed the within citation by delivering a true copy thereof to the within named Addie Kelly, as administratrix of Matt. Kelly, deceased, this 17 day of December, A. D., 1914.

R. C. FORD, *U. S. Marshal.*

OSCAR VEST, *D. M.*

[Endorsed:] C. & O. Ry. Co. v. Matt. Kelly's Adm'r's. Citation. Filed Dec. 19, 1914. Robt. L. Greerre, C. C. A.

350 On the 17th. day of December, 1914, the plaintiff in error filed in the officer of the Clerk of the Court of Appeals the following *Præcipe* for record in this appeal to the Supreme Court of the United States:

351 Court of Appeals of the State of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.

ADDIE KELLY, as Administratrix of Matt Kelly, Deceased, Appellee.

Præcipe of Said Appellant, Now Plaintiff in Error.

In conformity with Rule Eight of the Supreme Court of the United States, and in order to the preparation of the transcript of the record upon the Writ of Error from said Supreme Court to the Court of Appeals of Kentucky, the above named The Chesapeake and Ohio Railway Company, Appellant in said Court of Appeals, indicates the following as the portions of the record in this action to be incorporated into the transcript of the record on said Writ of Error, to-wit:

1. The preamble on page 1 of the transcript filed in the Court of Appeals:

2. The plaintiff's petition on pages 2-5 of said transcript;

3. The plaintiff's amended petition and the order noting same on pages 19-20 of said transcript;

4. The answer of the defendant and order noting same on pages 31-34 of said transcript;

5. The order entering the appearance of defendant, George Robinson, and noting his demurrer to the plaintiff's petition as amended, the submission of the case on said demurrer and the sustaining of said demurrer on page 36 of said transcript;

6. The reply of plaintiff and order noting the filing of same on pages 40-42 of said transcript;

7. The order dismissing the petition as to defendant, George Robinson, on page 42 of said transcript;

352 8. The plaintiff's second amended petition and order noting the filing of same on pages 46-48 of said transcript;

9. The order entered April 15, 1913, setting aside the order filing the second amended petition and entering another order in lieu thereof on page 53 of said transcript;

10. The motion of defendant made April 15, 1913, to strike out certain portions of the reply and of the first amended petition on page 52 of said transcript;

11. The defendant's answer to the second amended petition and order noting same on pages 54-55 of said transcript;

12. The order of September 8, 1913, noting the commencement of the trial and empaneling of the jury on pages 82-83 of said transcript;

13. The order of September 9, 1913, withdrawing defendant's

verse of certain allegations of the plaintiff's petition on page 83 said transcript;

14. The verdict of the jury returned on September 12, 1913, and order noting same on page 89 of said transcript;

15. The judgment of the Montgomery Circuit Court rendered September 12, 1913, on pages 89-91 of said transcript;

16. The order of September 13, 1913, noting the motion and grounds for a new trial, the order overruling the motion for a new trial and granting the appeal to the Court of Appeals and giving leave for the filing of the Bill of Evidence and Bill of Exceptions on page 91 of said transcript;

17. The motion and grounds for a new trial on pages 92-93 of said transcript;

18. The order noting the tender of the Bill of Exceptions and transcript of the evidence and defendant's motion that same be approved and filed on page 94 of said transcript;

19. The agreed order of January 22, 1914, as to the signing of the Bill of Evidence and Bill of Exceptions on page 105 of said transcript;

20. The defendant's Bill of Exceptions on pages 95-104 of said transcript;

21. The Bill or Transcript of the Evidence and proceedings on the trial of this action at the September Term 1913 of the Montgomery Circuit Court, filed as a part of the record upon the appeal from the judgment of said Court to the Court of Appeals of Kentucky;

22. The judgment of affirmance and opinion of the Court of Appeals of Kentucky, the Petition for a Rehearing by appellant, appellee's Response thereto and Appellant's Reply to said Response;

23. The order overruling the Petition for a Rehearing and the Response delivered by the Court of Appeals upon the making of said order, and the mandate of the Court of Appeals;

24. The Petition for Writ of Error, the Writ of Error and allowance of same, the Assignment of Errors, the Writ of Error Bond, Citation and return of service of same, this Præcipe and the return of service of same.

SHELBY, NORTHCUTT & SHELBY,

*Counsel for Above-named Appellant
and Plaintiff in Error.*

Executed the foregoing Præcipe by delivering a true copy thereof to Addie Kelly, Administratrix of Matt Kelly, deceased, this 17 day of December, 1914.

R. C. FORD, U. S. Marshal.
OSCAR VEST, D. M.

354 COMMONWEALTH OF KENTUCKY,
Court of Appeals, sct:

I, Robert L. Greene, Clerk of the Court of Appeals of Kentucky, in obedience to the commands of the attached Writ of Error, and in compliance with the Præcipe filed herein, herewith transmit to the

Supreme Court of the United States a transcript of such parts of the record in the case of Chesapeake & Ohio Railway Company, Appellant and Plaintiff in Error, vs. Matt Kelly's Administratrix, Appellee and Defendant in Error, as is called for by said Præcipe and as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol, at Frankfort, Kentucky, this 6th day of January, A. D. 1915.

[Seal Court of Appeals, Kentucky.]

ROBERT L. GREENE,

Clerk of Court of Appeals of Kentucky.

Fee for transcript, \$106.40.

Endorsed on cover: File No. 24,508. Kentucky Court of Appeals, Term No. 321. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. Addie Kelly, as administratrix of Matt Kelly, deceased. Filed January 11th, 1915. File No. 24,508.

12
Office Supreme Court, U. S.

FILED

MAR 14 1916

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 321.

THE CHESAPEAKE & OHIO RAILWAY
COMPANY, - - - - Plaintiff in Error,

versus

ADDIE KELLY, AS ADMINISTRATRIX OF
MAT KELLY, DECEASED, - - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN T. SHELBY,
R. L. NORTHCUTT,
JOHN CRAIG SHELBY,
Counsel for Plaintiff in Error.

H. T. WICKHAM,
HENRY TAYLOR, Jr.,
LEWIS APPERSON,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 321.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

VS. BRIEF FOR PLAINTIFF IN ERROR.

ADDIE KELLY, AS ADMINISTRATRIX OF MAT KELLY,
DECEASED, - - - - - *Defendant in Error.*

STATEMENT.

This action was instituted in the Montgomery Circuit Court, State of Kentucky, by defendant in error (hereinafter denominated "plaintiff") to recover damages for the death of her intestate in the derailment of a train of plaintiff in error, of which he was engineer. Plaintiff apparently attempted to sue both under the Employers' Liability Act of Congress of April 22, 1908, as amended by the Act of April 1, 1910, and under the statute of the State of Kentucky, as she joined as a defendant with plaintiff in error (hereinafter denominated "defendant"), a roundhouse foreman and afterwards a master mechanic. The action, however, was finally abandoned as to the two individuals and proceeded against the defendant under the Federal Act. By her petition and several amended petitions (Pr. Rec., 1, 3, 8), it was alleged that the defendant and plaintiff's intestate were, at the

time of the derailment, engaged in interstate transportation and commerce; that the locomotive which her intestate was required to run was defective, and the track over which he was required to run was in a defective and dangerous condition, which defects were known to defendant; that on account of the said condition of the track and locomotive, the latter was derailed and plaintiff's intestate, who was the engineer thereof, killed; that he left surviving him his widow, the plaintiff, and six children, aged from four to twenty-two, all of whom were dependent upon him.

The issues were duly made up, the traverse of the allegation that the deceased was employed in interstate transportation was withdrawn, and the trial resulted in a verdict and judgment in favor of plaintiff for \$19,011, which was apportioned among the widow and infant children.

The court did not permit a recovery in favor of the son who had attained his majority. The testimony showed that the son, Tom, had some difficulty with his eyes, and the jury allowed him more than the other children, who were all in good health. An appeal was prosecuted from this judgment to the Court of Appeals of Kentucky, where it was affirmed: 160 Ky. 296. Defendant thereupon filed a petition for rehearing (Pr. Rec., 182) upon the ground that, as the statutes of Kentucky required the trial court to give an instruction authorizing nine of the jury to return a verdict, the court had no jurisdiction of the action because the limitations of the Seventh Amendment inhered in the right created by the Employers' Liability Act. A rehearing was denied: 161

Ky. 655, and from the judgment of the Court of Appeals this writ of error is prosecuted.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows (Pr. Rec., 198):

1. The said court erred in holding and deciding that the Montgomery Circuit Court, from whose judgment this appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject-matter of this action, and in refusing to reverse said judgment and remand this action to said Montgomery Circuit Court with directions to dismiss the same.

2. The said court erred in holding and deciding that said Montgomery Circuit Court had committed no error in giving to the jury Instruction No. 2, which was in words and figures as follows:

“If the jury believe from the evidence that the defendant negligently suffered its engine, appliances, track or roadbed, to be defective or insufficient, and that defendant knew, or by the exercise of ordinary care should have known of such defect or insufficiency, if any existed, in time by the exercise of ordinary care to have avoided injury to said Mat Kelly and failed before his injury to remedy the defect or insufficiency, if any, and that as a direct result of said negligence and failure, if any there was, said Kelly received the injury which caused his death, then the jury should find for plaintiff.

“If the jury do not so believe and find, they will find for the defendant;”

said instruction being erroneous, in that it did not require the jury to believe, by a fair preponderance of the evi-

dence, the facts upon which the liability of the defendant was by said instruction predicated.

3. The said court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in giving to the jury instructions No. 4 and No. 5, which were in words and figures as follows:

“(4) If the jury should find for plaintiff, they should fix the damages at such sum as would reasonably compensate the dependent members of the family of said Kelly, if any there be, for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of said Kelly’s injury and death. In fixing said amount, the jury are authorized to take into consideration the evidence showing the decedent’s age, habits, business ability, earning capacity, probable duration of life; and also the pecuniary loss, if any, which the jury may find from the evidence that the dependent members of his family, if any, have sustained because of being deprived of such maintenance or support or other pecuniary advantages, if any, which the jury may believe from the evidence they would have derived from his life thereafter.”

“(5) If the jury find for the plaintiff, they will find a gross sum for the plaintiff against the defendant, which must not exceed the probable earnings of Mat Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sum which the jury may find from the evidence and fix as the pecuniary loss as above described, which each dependent member of Mat Kelly’s family may have sustained by his death, stating the amount awarded his widow, Addie Kelly, if any, and his infant children, Carroll Kelly, Mat L. Kelly, Ruth Kelly, Thomas J. Kelly and Richard Kelly, if any for them, or any of them, but such findings in the aggregate must not exceed \$32,000.00.

They will not find any sum for Sylvester Kelly. In other words, if the jury find for the plaintiff, you must in your verdict state also the respective amounts awarded each dependent member of decedent's family.

"If the jury believe from the evidence that the said family of Mat Kelly had and have any other income than from the earning capacity of Mat Kelly, they should take into consideration and deduct such income, if any, and as to the infants said recovery must be limited to their infancy or until they arrive at the age of twenty-one years.

"And as to Mrs. Addie Kelly, the jury should, if they find anything for her, limit such recovery to the period of her dependence, and in no event for a longer period than her husband, Mat Kelly, would probably have lived;"

said instruction being erroneous for the following reasons:

(a) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts such as the decedent's age, habits, business ability, earning capacity and probable duration of life, all of which went to enhance the amount of damage, they were not told that they might take into consideration his health, his physical condition, and the hazardous nature of the employment in which he was engaged, which were circumstances tending to decrease the estimate of damage.

(b) Said instructions do not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependents from a continuance of the life of the decedent, but permit the jury to estimate such pecuniary advantage as being equal

to the probable earnings of said decedent during the whole period of his life expectancy.

(c) Said instructions do not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(d) Said instructions do not confine the reasonable expectancy of pecuniary advantage to the infant children of said Mat Kelly for which recovery might be allowed to the period of their dependency, nor, indeed, to the period of their infancy, and do not confine the reasonable expectation of pecuniary advantage to the widow of said decedent to the probable period of her widowhood.

4. The said court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in refusing, upon defendant's request, to modify the foregoing Instruction No. 4 so that the jury, in estimating the damages to be allowed to the widow and infant children, should take into consideration the decedent's health and physical condition and the hazardous nature of the employment in which he was engaged.

5. The said court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in refusing to give, at defendant's request, the instruction marked B, which was in words and figures as follows:

"B. If the condition of the rails at the place of the accident and the character of the engine truck and front driving wheels were such as were, at the

time of the accident, generally approved as respects safety by the expert judgment of men of experience and knowledge in railway construction and engine mechanism, the jury are instructed that it was not negligence on defendant's part to use the same, and they should find for defendant."

6. The said court erred in holding and deciding that the said Montgomery Circuit Court had committed no error in refusing to give, at defendant's request, the instruction marked D, which was in words and figures as follows:

"D. If the jury find for the plaintiff, they will fix the damages at that sum which represents the present cash value of the reasonable expectation of pecuniary advantage to the infant children of said Mat Kelly from the continuance of the life of the decedent, Mat Kelly; said sum to embrace only pecuniary advantage to said Addie Kelly during her widowhood and while dependent and pecuniary advantage to said infant children while dependent and until they became twenty-one years of age, and they will apportion the amount so found among said widow and dependent infant children.

"In fixing the amount of said damages, if any, the jury can not award any sum on account of Sylvester Kelly, and can not award any amount on account of the widow and infant children of said Mat Kelly in excess of the reasonable expectation of pecuniary advantage to said widow and infant children on account of their dependency, if any, and the amount of any pecuniary advantage should be diminished by the amount of whatever income and earning capacity, if any, said widow and infant children have during their periods of partial dependency, if any. In other words, no award of damages can be made to said widow and infant children, except to compensate them for any sum they might need and might reason-

ably expect from said Mat Kelly on account of their dependency over and above their income and earning capacity."

ARGUMENT.

I.

The Montgomery Circuit Court Did Not Have Jurisdiction of this Action.

The Constitution of Kentucky provides in Section 248 that:

"The General Assembly may provide that in any or all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

This section is carried into effect by Section 2268, Kentucky Statutes, as follows:

"That in all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

Our contention, under the first assignment, is that the limitation of the Seventh Amendment to the Federal Constitution preserving the common-law right of trial by jury, *i. e.*, a jury of twelve *whose verdict must be unanimous*, inheres in every right of action created under the authority of that Constitution, and that as the courts of Kentucky are unable, by reason of the statute above quoted, to secure to litigants that right, they are without jurisdiction of actions arising under the Federal Employer's Liability Act; and that, therefore, the Mont-

gomery Circuit Court is not what is denominated in the Act as a "State Court of competent jurisdiction." This proposition is involved in all the cases which have been advanced for hearing with this one, to-wit, Louisville & Nashville Railroad Company v. Stewart (No. 485), St. Louis & San Francisco Railway Company v. Brown (No. 399), The Chesapeake & Ohio Railway Company v. Carnahan (No. 743), The Chesapeake & Ohio Railway Company v. Dwyer (No. 453), and The Minneapolis & St. Louis Railroad Company v. Bombolis (No. 478); and one general brief discussing it has been prepared for filing in each of the cases, and we refer to that brief for a full discussion of the proposition.

The proceedings in the trial courts were not, however, the same in all the cases, and this makes it necessary for us to refer to one or two features peculiar to this case.

It may be suggested that the defendant should have objected to the jurisdiction of the State Court before filing its petition for rehearing. But this was not necessary, and the Court of Appeals did not attempt to dispose of the petition for a rehearing on this ground. If the Montgomery Circuit Court did not have jurisdiction of the *subject-matter* of the action, it could not acquire such jurisdiction by the failure of defendant to object at the inception of the case. The question of the jurisdiction of the subject-matter can not be waived, but may be raised at any time, and should be raised by the court itself whenever presented to its notice:

Cooley Const. Lim. (6 Ed.), p. 491.

Ormsby v. Lynch, Litt. Sel. Cases, 307.

Lindsey v. McClelland, 1 Bibb, 263.

Fidler v. Hall, 2 Met. 461, 463.

Davidson v. Johnson, 113 Ky. 210.

Mansfield C. & L. M. R'y v. Swan, 111 U. S. 379,
382, 28 L. Ed. 462, 464.

Metcalf v. City of Watertown, 128 U. S. 586, 587,
32 L. Ed. 543.

The question of jurisdiction was presented to the Court of Appeals by the petition for rehearing (Pr. Rec., 182), and ruled against plaintiff in error.

It may also be contended, as it was below, that even if the limitations of the Seventh Amendment inhere in rights of action created by the Employers' Liability Act, the defendant can not complain because the verdict of the jury was unanimous. To this there are two sufficient answers:

(a) The defendant was compelled by the law of Kentucky to try its case before a jury, a minority of three, or less, of which was powerless to accomplish anything. Any three or less number of jurors for the defendant knew that they could not affect in any way the result reached by the other nine, and, for this reason jurors not in favor of a verdict often do not oppose it when they see it is going to be returned in any event. Defendant's rights were prejudiced by the fact that three-fourths of the jury controlled it absolutely, and that it considered the case with knowledge of this power ever in mind.

(b) If the Montgomery Circuit Court had no jurisdiction, the fact that action of a certain kind was taken can not affect the question, as all proceedings before it

were *coram non judice*; and the want of power to act at all can not be cured by the fact that in the course of non-judicial proceedings certain prescribed forms of law were observed.

II.

Plaintiff Should Have Been Required to Make Out Her Case by a Fair Preponderance of the Testimony.

The second error assigned is based upon the failure of the trial courts to require the jury to believe, from a *fair preponderance of the evidence*, the facts upon which the liability of the defendant was, by Instruction 2 (Pr. Rec., 18), predicated. One of the objects of the Employers' Liability Act was to provide a law operating uniformly upon the claims of servants against masters engaged in interstate transportation by railroad. In the Federal courts and in many of the State courts the plaintiff is required to establish his case by a fair preponderance of the evidence:

Improvement Co. v. Munson, 14 Wall. 442.

Pleasants v. Fant, 22 Wall. 116.

McGuire v. Blount, 199 U. S. 148.

In Kentucky, however, the trial court is required to submit the case to the jury if there be a *scintilla* of evidence in favor of plaintiff, and in cases arising under the State law, it will not instruct that the party carrying the burden must establish his case by a fair preponderance of the evidence; and while in some cases it has the power to set aside a verdict based on a *scintilla* if it is flagrantly

contrary to the weight of the evidence, it can only do this twice and a third verdict in favor of plaintiff can not be set aside on this ground regardless of the reasons for setting aside the first two verdicts: *L. & N. R. R. Co. v. Daniel*, 131 Ky. 689.

A servant having no hope of making out a case under the law of West Virginia could cross into Kentucky, if defendant's lines entered Kentucky, and sue with fair prospect of success against a corporate defendant. This would destroy uniformity in the administration of the law, and the only way to avoid it would be to adopt the rule of the Federal courts based on the general common law: *St. Louis, etc., R'y Co. v. McWhirter*, 229 U. S. 265.

III.

Instruction B Should Have Been Given.

We pass temporarily over assignments 3 and 4, and will discuss them later in connection with assignment 6, and will now consider the fifth error assigned, viz., the refusal of the court to give Instruction B (*Pr. Rec.*, 17). Plaintiff claimed that certain parts of the locomotive were of an obsolete and dangerous type, and that the rails in the track were worn and defective, and there was evidence, but not of real experts, to sustain these contentions. Defendant showed by a civil engineer of great experience in railway construction and maintenance that a railroad track in the condition this one was would be considered safe by qualified engineers (*Pr. Rec.*, 166, 169), and it proved by various mechanical experts that

the trucks and drive wheels of the locomotive complained of as being of an obsolete pattern were considered entirely safe and proper by master mechanics and men in the mechanical departments of railroads. (Pr. Rec., 174-5, 152, 156, 138.) Under this testimony the defendant was entitled to have Instruction B given; because if the condition of the rails and the character of the engine truck and driving wheels were such as were generally approved as respects safety by the expert judgment of men of experience in railway construction and engine mechanism the defendant was not guilty of negligence:

Sherman & Redfield on Neg., Sec. 195.

New Galt House Co. v. Chapman, 124 Ky. 527, 532.

Therefore, by the refusal of Instruction B, defendant was deprived of its right to have the jury properly instructed as to the elements necessary to constitute actionable negligence under the Federal statute, and it is entitled to be shielded from responsibility, except for such negligence: St. Louis, etc., R'y Co. v. McWhirter, *supra*.

IV.

Instruction on Measure of Damages.

We will discuss assignments 3, 4 and 6 together, as they all relate to a proper measure of damage instruction.

(a) By instructions 4 and 5 (Pr. Rec., 18-19), which are copied in the third assignment, the jury were told to award the dependents such sum as would reasonably

compensate the dependent members of the family of said Kelly for the pecuniary loss sustained by them. Under these instructions the jury were authorized to award in a lump sum the aggregate of what all of the dependents would have received from year to year during the whole of Kelly's life, and, as we shall show, they did this, and more than this. To avoid this manifestly erroneous result, the jury should have been told to award that sum which represented the *present cash value* of reasonable expectation of pecuniary advantage to the dependent widow and infant children. The error in question was called to the attention of the court by Instruction D offered by defendant (Pr. Rec., 17), and which is copied in the sixth assignment. We call attention to a clerical error in that instruction as it appears in the record. The following words have been omitted in copying it since it was tendered: "the present cash value of the reasonable expectation of pecuniary advantage to the widow, Addie Kelly, and." These words followed the word "represents" in the second line. The record does not, of course, show exactly what has been omitted, but the instruction later on shows that the sum awarded is to embrace pecuniary advantage to the widow during her widowhood and while dependent; and it is so plain from the latter part of the instruction that the widow, as well as the dependent children, was to be awarded damages in the event of a finding for plaintiff that the omission of her name in the first part of the instruction as it now appears is an error that corrects itself. But, in any event, under the practice in Kentucky, it is the duty of the trial court,

when it undertakes to give an instruction, to give a correct one on the subject, and if a party offers one that is incorrect, it then also becomes the duty of the court to give a correct instruction on the subject to which it refers: *Louisville, etc., R'y Co. v. Roberts*, 144 Ky. 820, 824.

The proper measure of damage in such cases was clearly stated by the Court of Errors and Appeals of New Jersey in *Hackney v. Delaware & A. T. & T. Co.*, 69 N. J. Law 335, 55 Atl. 252, where, after referring to previous cases, it said:

"In none of the cases cited has it been in express language set forth that it is the present value of the pecuniary loss which the jury is to find, although such an expression is usually found in the charges of the trial judges at the circuit. In the charge before us, the jury were permitted to consider the whole amount of the possible pecuniary benefits which the widow and next of kin would have received from time to time during the life of the intestate, had he lived, and to sum that up as the measure of damages. That instruction did not require the taking into account of the present possession of the whole fund, and the resultant benefit therefrom, and the future accretions thereon, and hence was erroneous."

In *McCabe v. Narragansett E. L. Co.*, 26 R. I. 427, 59 Atl. 112, the following method of computing the loss is adopted:

"It is obvious, too, that the loss sustained by the plaintiff here is the present cash value of the net result remaining after his personal expenses are deducted from his income or earnings. To ascertain this, it is, of course, necessary to ascertain first the

gross amount of such prospective income or earnings; then to deduct therefrom what the deceased would have to lay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits; and then to reduce the net result so obtained to its present value."

We will not quote from other cases, but the following are to the same effect:

- L. & N. R. R. Co. v. Trammell, 93 Ala. 354-5.
- Benton v. R. R. Co., 122 N. C. 1007, 30 S. E. 333.
- Watson v. S. A. L. R'y Co., 133 N. C. 188, 45 S. E. 555.
- Rudiger v. Chicago, etc., R'y Co., 101 Wis. 292, 77 N. W. 169.
- Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803.

Manifestly this is the correct rule, as the dependent beneficiary is entitled to receive only that of which he was deprived by the death, which is an annuity during dependence, and if the amount of the annuity is multiplied by the number of years of dependence and the product paid at once in cash, the beneficiary receives more than he would have received had the death not occurred. The right to have the amounts which the beneficiaries would have received yearly but for the death reduced to present value is a very substantial one. The expectation of the decedent in this instance was twenty-two years, and if the jury concluded that the widow could have expected from him \$300 annually during this period but for the accident, they would have awarded her, under the instruction given by the court, \$6,600, whereas we know

from the annuity tables that the present value of \$300 per annum, payable at the end of each year, compounded annually at 6% (the legal rate of interest in Kentucky) is only \$3,612.60. It will be seen that 6% interest on the sum the jury would have awarded amounts to more than what the beneficiary would have been entitled to per annum, so that the beneficiary would have received each year more than \$300 and at the termination of the twenty-two-year expectancy would have the principal sum of \$6,600 intact.

For the purpose of illustrating the prejudice worked by the instruction under consideration, we have prepared a statement changing the lump sums awarded the beneficiaries to the basis of annuities during dependency, estimating the widow's dependency at the total expectation of life of her husband and the periods of the dependency of the children as continuing from their father's death until they attained their majority. The result is as follows:

Mrs. Kelly . . .	\$7,040	equals	\$585	per year	for 22 years
Carroll	1,288	"	262	"	" " 6 "
Matt	1,580	"	232	"	" " 9 "
Ruth	2,273	"	289	"	" " 11 "
Tom	4,371	"	483	"	" " 13 "
Richard	2,459	"	227	"	" " 18 "
			<hr/>		
			\$2,078		

The decedent was earning at the time of his death \$172 per month, or \$2,064 per year, by working every day, whereas the jury allowed the beneficiaries for the first six years after his death until the oldest dependent

became twenty-one, \$2,078 per year. This court can not, of course, revise the finding of a jury upon a mere question of fact, nor reverse because the damages allowed are in excess of what should have been allowed upon the evidence. The point we are making, however, by the foregoing remarks upon the amounts allowed does not call for the application of this rule, for we are not contending here that they are not what they should have been under the evidence, but that they are *contrary to law*. It is not lawful that there should be allowed to dependents, who, under the Employers' Liability Act, are entitled only to compensation for the deprivation of such pecuniary advantage as they could reasonably expect from a continuance of the life of the decedent, a sum in excess of his total earnings either actual or reasonably to be anticipated. The foregoing computation shows that this illegal result was actually reached in this case, and the error in it is, consequently, not merely a mistaken view of the facts by the jury, but is a violation of the law, capable of correction by this court even if it had been committed in spite of a properly drawn instruction. That it is really directly traceable to an improper instruction only gives added emphasis to the right to have it corrected.

The Court of Appeals of Kentucky thought the task of ascertaining the present value of the loss was "more than ought to be asked of any one less qualified than an actuary" (Pr. Rec., 181). But defendant's rights should not have been sacrificed merely because their preservation was difficult. It was not impossible for the jury to

ascertain the present value, and if plaintiff thought this was so, she could have introduced the annuity tables, as was done in *Reynolds v. Narragansett E. L. Co.*, 26 R. I. 457, 59 Atl. 393.

(b) Said instructions were also erroneous in that they singled out every fact tending to enhance the damages, such as expectancy, habits, earning capacity, etc., but did not call attention to facts having a tendency to diminish the damage. Defendant's motion (Pr. Rec., 20, copied in the fourth assignment) to modify Instruction 4 by directing the jury to take into consideration decedent's health, physical condition and the hazardous nature of his employment should have been sustained. Dr. Wiggleworth's life table is based on the ordinary expectation of life, and not on the expectancy of persons engaged in hazardous employments. The decedent was able to earn \$172 per month in a hazardous employment, and it was error for the jury to consider the high wages in the hazardous employment without also considering that the expectancy of life in that employment was less than normal: *Stewart's Admr. v. L. & N.*, 136 Ky. 717, 724.

(c) Said instructions were also erroneous in not confining the amount of recovery within the limits of the *net value* of the probable earnings of the decedent:

McCabe v. Narragansett E. L. Co., supra.

Under Instruction 5 especially the jury were authorized to award all of the earnings to the beneficiaries, not tak-

ing into account at all the amounts decedent might have spent upon himself.

(d) Neither of said instructions confines the recovery in favor of the children to the periods of their dependency, the recovery as to the infants being merely "limited to their infancy or until they arrive at the age of twenty-one years." Under the evidence the jury might have believed that the dependency of the boys ceased at eighteen or nineteen (Pr. Rec., 23, 24), but, under the instructions, if they were dependent at the time of their father's death, they would be entitled to recover for the period until they reached twenty-one, regardless of whether they had in the meantime ceased to be dependent.

A reversal of the judgment of the Kentucky Court of Appeals is respectfully asked,

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authority but arises in the nature of courts of general jurisdiction. Moreover the Congress cannot vest in State Courts any judicial power of the United States."

Reference is made to certain observations of Mr. Justice Story in *Martin v. Hunter*, 1 Wheaton, 330; and Mr. Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheaton, 264.

Reliance is also made upon the case of *Robertson v. Baldwin*, 165 U. S. 275 and the 82nd Federalist.

It is apparently urged in the brief that competent State Courts taking jurisdiction of cases under the Employer's Liability Act are not exercising any portion of the judicial power of the United States and therefore it is argued the Seventh Amendment does not apply to them.

In our original brief we undertook to establish, among other things, that—

(1) State Courts in taking jurisdiction of these cases are Federal agencies, and

(2) The Seventh Amendment inheres in the Federal right.

What was meant by "federal agencies" was, as shown, that competent State Courts in these cases were courts duly authorized under the Federal system to take jurisdiction of these cases, in fact required so to do (*Second Employer's Liability Cases*, 223 U. S. 1.) .

Construing the words "judicial power" to embody just that idea our contention of course means that, to that extent, State Courts in these cases are exercising "judicial power" of the Federal government. It is therefore urged by our opponent that our contention runs counter to the views expressed by the eminent authorities referred to.

It is true that Mr. Justice Story said in *Martin v. Hunter* that "Congress cannot vest any portion of the judicial power except in courts ordained and established by itself," thus indicating that State Courts could not exercise origi-

nally any portion of the judicial power of the United States.

Our opponents have, however, overlooked the conclusion to which Mr. Justice Story came, from that premise, and that was that "*State Courts could not take direct cognizance of cases arising under the constitution, laws and treaties of the United States*". (See *Clafin v. Houseman*, 93 U. S., 140, wherein Mr. Justice Bradley seems to concur in this view as to "jurisdiction depending on the United States authority").

This conclusion, it seems, carries small comfort to our opponents since it is undoubtedly true that State Courts in these cases are undertaking to take "direct cognizance" of cases arising under the constitution and laws of the United States. The views of Mr. Justice Story seem to have been shared by Mr. Justice Brown. (See the *dictum* to that effect in the case of *Robertson v. Baldwin*, *supra*.)

It will be observed that Mr. Justice Story did not intimate that if State Courts were permitted such jurisdiction they would not be exercising the judicial power of the United States. In fact he actually decided in *Martin v. Hunter* that the judicial power of the United States extended to the case in the State Court, even where the *casus foederis* did not arise *directly* (as where the action is brought under a law of the United States) but where it arose *incidentally* during the progress of the cause and that it was the *case* and not the *court* which gave the jurisdiction. In fact he pointed out in that case that the appellate power is but an incident to the judicial power—which is obviously true. Nor do we think anything said by Mr. Chief Justice Marshall in *Cohens v. Virginia* militates against this view—on the contrary that case sustains it in every particular. (See particularly the quotation from that case on page 26 of our original brief). We do not contend that State Courts are converted into Federal Courts or *vice versa*. We admit "the one court still derives its

authority from the State, the other still derives its authority from the Nation" (brief for defendants-in-error, p. 16), but this is far from saying that the judicial power of the United States, in the sense we have used the expression, does not extend to the case.

The legislative power of the government is concerned with the making of laws and the judicial power with their *construction and enforcement* (*Martin v. Hunter*). A law of the United States in the cases before us is sought to be enforced in tribunals which, if competent, are not only authorized but required by the Federal government to take jurisdiction. To say that they are not then exercising the judicial power of the government is to deny that the judicial power of the government is the branch of the government concerned with the enforcement of its laws, which is the very definition of the power.

We have examined the briefs in the *Mondou case* (223 U. S. 1) and the opinion of the Supreme Court of Connecticut in the *Hoxie case* (involved in the *Mondou case*) and find that the authorities above referred to were there stressed as showing that the State Courts should not take jurisdiction of these cases.

Said the Supreme Court of Connecticut in the *Hoxie case* (82 Conn. 368) :

"The act of 1908 (the Employer's Liability act) if constitutional, enlarges the judicial power of the courts of the United States by giving in a certain class of causes a judicial remedy where none previously existed. This remedy is by plenary action. If we understand correctly the position of the Supreme Court of the United States, no part of the judicial power of the United States, when it is to be exercised in the form of an original plenary action can be vested in any court not created by the United States."

Citing among others the authorities relied on by our opponents. (We have taken this quotation from the brief of Mr. Edward D. Robbins in the *Mondou case*, p. 75).

Our opponents have assumed, unconsciously no doubt, the position taken by the Supreme Court of Connecticut, and their argument in this connection, carried to its logical conclusion, would exclude the jurisdiction of the State Courts in these cases, altogether.

This Court, however, has required that State Courts, if competent and adequate, shall take jurisdiction and therefore have required them to exercise the judicial power of the United States "in the form of an original plenary action" arising under a law of the United States.

This being true the Seventh Amendment extends to the case, for the reasons stated in our original brief.

We might add that the views of Mr. Hamilton in the *Federalist* did not accord with the views of Mr. Justice Story on this question, since Hamilton was of the opinion that Congress could commit to State Courts "the cognizance of causes arising out of the national constitution" (*The Federalist*, No. 81).

II.

Our opponents, at pages 19-21 [Point (d)] consider the analogy between Territorial courts and State courts when administering causes of Federal origin as "wholly inapt" —page 21. Our opponents concede that "in all classes of cases the courts of the Territories are obliged to pursue the method of trial prescribed in the Amendment," but contend that "if the subject-matter determined the application of the Seventh Amendment, then Territorial Courts would be obliged to adopt that method only in those cases which involve Federal rights." But this is incorrect if the Seventh Amendment is a limitation on the power, judicial and legislative, of the Federal sovereign.

Territorial courts are courts of the territories authorized by Congress, not in the exercise of "the judicial power of the United States," but under another power of Congress, namely the power to make all needful rules and regulations respecting the territories belonging to the United States. In *Clinton v. Englebrecht*, 13 Wall. 434 (1872), Mr. Chief Justice Chase said:

"There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the general Government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States. *Am. Ins. Co. v. Canter*, 1 Pet. 545."

But our opponents assert at page 19 of their joint brief:

"The reason the Seventh Amendment applies to the territories and the District is that the United States is sovereign and the Seventh Amendment is binding upon the United States in creating its *judiciary*." (Italics ours).

To sustain their position they must confine the limitation of the Seventh Amendment to the Federal judiciary and exclude that limitation from the legislative and other powers of the Federal sovereignty. So we find this as an asserted point of law at page 22 of our opponents' joint brief: "The Seventh Amendment Applies to the Federal Judiciary Not to Federal Rights;" and again at page 28: "The Sev-

enth Amendment Is a Limitation on the Organization of the Federal Judiciary, Not a Limitation on Legislation Creating Rights."

In the territorial cases decided by this Court and set forth in our opening brief this Court has demonstrated that the Seventh Amendment does operate upon the courts of the Territories: and has demonstrated that the Territorial courts are not courts of the United States. The decision of this court in *Clinton v. Englebrecht*, read with the Territorial decisions already referred to,—by showing that the Territorial courts are courts of the Territories authorized by Congress under the Territorial power, and are not courts of the United States,—has answered the assertions in the joint brief of our opponents that the Seventh Amendment is a limitation only upon the Federal judiciary.

The Seventh Amendment inheres in the administration of the law in the Territorial courts because the amendment is not merely as our opponents contend a restraint upon the Federal judiciary, but is a restraint on the Federal sovereign power, judicial and legislative—a grant of a substantial right in connection with every cause of action at law created by Congress, and enforceable under the Federal system.

III.

Our opponents make suggestions like this, at page 21:

"Thus it will be seen that State Courts take cognizance of these cases not by the authority of the enacting power, but in the exercise of their general jurisdiction."

The suggestion perhaps is that the jurisdiction of the State Courts over causes arising under the Federal Employers' Liability Act is not different from the jurisdiction which existed before the passage of that act—a jurisdic-

tion "to take cognizance of actions to recover for personal injuries and for death:" *Second Employers' Liability Cases*, 223 U. S. 1. Accordingly, the suggestion of our opponents seems to present the theory that the Federal Employers' Liability Act merely effected a change of authority creating the cause of action for personal injuries or death without changing the nature of the right itself.

When Congress enacted the Federal Employers' Liability Act something more was done than to shift authority. A cause of action was created having as one of its substantial attributes the right to a trial before an unanimous jury of twelve men. The exercise of power by Congress in creating causes of action for injury to and death of an employe while employed by a railroad in interstate commerce is an exercise of the commerce power: Article 1, Section 8. This Court has defined the effect of the Federal Employers' Liability Law in the opinion written by Mr. Justice Holmes in *Atlantic Coast Line R. R. Co. v. Burnette*, 239 U. S. 199, to be the creation of "the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source." The Federal law displaces the local law and we have here, therefore, not a mere shift of authority but new and differing rights and liabilities supplied by Federal law, subject to all constitutional limitations.

By the exercise of this authority over interstate commerce, the Congress, as we have seen, not only erected a cause of action for personal injuries or death but, by so acting in the exercise of a constitutional grant of power, did so subject to the Seventh Amendment and, therefore, attached, as an inseparable substantive and substantial right, the right to trial by a unanimous jury of twelve men. Whether the right to such a trial by jury be called, as our opponents suggest, a "mode of administration of law" or as a matter of "substance of right," as Mr. Justice Brewer

called it in *Walker v. New Mexico & Southern Pac. R. R. Co.*, 165 U. S. 593, at page 596, seems to be a dispute of nomenclature, as Mr. Justice Holmes said in *A. C. L. R. R. Co. v. Burnette*, *supra*:

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."

IV.

In the original brief under heading (6) we have pointed out that Congress has expressly extended the right of trial by jury to the cases under consideration by the terms of the Federal Employers' Liability Act itself.

As supplementary to what is therein advanced it should be observed that Sec. 3 of the act provides:

"But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe".

Thus the act itself plainly contemplates a jury for the trial of cases arising thereunder.

Now the word "jury" in Federal jurisprudence when used in the connection in which it is used in the act had a certain, definite meaning—it means a jury such as exists at common law, a body of twelve men whose verdict must be unanimous. The term has always been so construed in Federal courts.

Am. Pub. Co. v. Fisher, 166 U. S. 464;
Thompson v. Utah, 170 U. S. 343;
Capitol Traction Co. v. Hof, 174 U. S. 1.

"Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of the decisions" of Federal Courts.

Central Vermont R. Co. v. White, 238 U. S. 507.

With full knowledge that such a meaning had always been given to the term "jury" when used without qualification, as in the statute, Congress in the use of the words evidently intended to require a common law jury.

As an original proposition, and aside from the previous decisions of the courts, it could hardly have been the intention of Congress that the same word should have a different meaning in Virginia than from what it had, say, in Massachusetts; particularly since the term in its ordinary signification denotes a definite legal entity and is not referable to a class. Moreover if the term jury should not be given its ordinary meaning and be held to vary with the State laws, where would the line be drawn? If the term does not import the idea of twelve men, it does not import the idea of three or two. And what becomes of the "jury" in those State courts which, under the local laws, leave the decision of the case to the Judge? All of which goes to show that some definite meaning must be given to the word "jury" as used by Congress, in order that the word may stand at all: and what definite meaning could there be but the sense in which, doubtless, every authority connected with the passage of the law understood it—the historic meaning of the term?

Had the Federal statute provided expressly: "the trial of these cases shall be by jury"—just what the Seventh Amendment says,—it could not be disputed that a jury of twelve would be intended. We think the words used in the statute carry just that idea.

Thus it appears to be immaterial whether or not the Sev-

seventh Amendment of the Constitution of the United States extends to the trial of these cases in the State Courts. The control of Congress over the subject is conceded to be plenary (*Second Employers' Liability Cases*, 223 U. S. 1), and if the Seventh Amendment should be held to be inapplicable, the right of trial by jury is still required by virtue of express Congressional enactments.

The case *Am. Pub. Co. v. Fisher*, 166 U. S. 464, presented a precisely analogous question. The territorial laws of Utah provided that the verdict of nine men should be sufficient in the trial of civil cases. The act of Congress establishing a territorial government for Utah provided that no party should be "deprived of the right of trial by jury in cases cognizable at common law."

The Court, speaking through Mr. Justice Brewer, said (p. 467):

"But if the Seventh Amendment does not operate in and of itself to invalidate this territorial statute then Congress has control over the territories irrespective of any express constitutional limitations, and it has legislated in respect to the matter."

And it was held that the right of "trial by jury" as contained in the congressional enactment meant a common law jury which the territorial legislature could not invalidate.

The similarity between the holding in that case and the contention here is so striking that comment is unnecessary.

In this connection there is a contention in the joint brief of defendants-in-error which should perhaps be noted. It is said in effect at page 4 that if Congress did not intend all State Courts to have jurisdiction of these cases then why did it give State Courts concurrent jurisdiction? This contention overlooks the fact that most of the State Courts provide common law juries and that, in any event, under the terms of the statute, not all State Courts have a right

to try these cases but only courts of "competent jurisdiction."

It is further said that Federal Courts have no jurisdiction over these cases where the amount involved is less than \$3000. Of course, if the Seventh Amendment applies, this fact would not be of any moment. In any view it would merely be a vague inference. The contention is that in those States which have no common law juries there is no remedy provided, under our construction, for cases involving less than \$3000. If so, it would have simply been a *casus omissus* which certainly would not justify the jurisdiction of a court which is expressly declared to be incompetent.

But it is not true that Federal Courts have no jurisdiction in these cases where the amount involved is less than \$3000.

The District Courts of the United States have jurisdiction of these cases irrespective of the amount involved. Sec. 24, par. 8, of Judicial Code of U. S.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 321.

THE CHESAPEAKE & OHIO RAILWAY

COMPANY, - - - Plaintiff in Error,

VERSUS

ADDIE KELLY, AS ADMINISTRATRIX OF

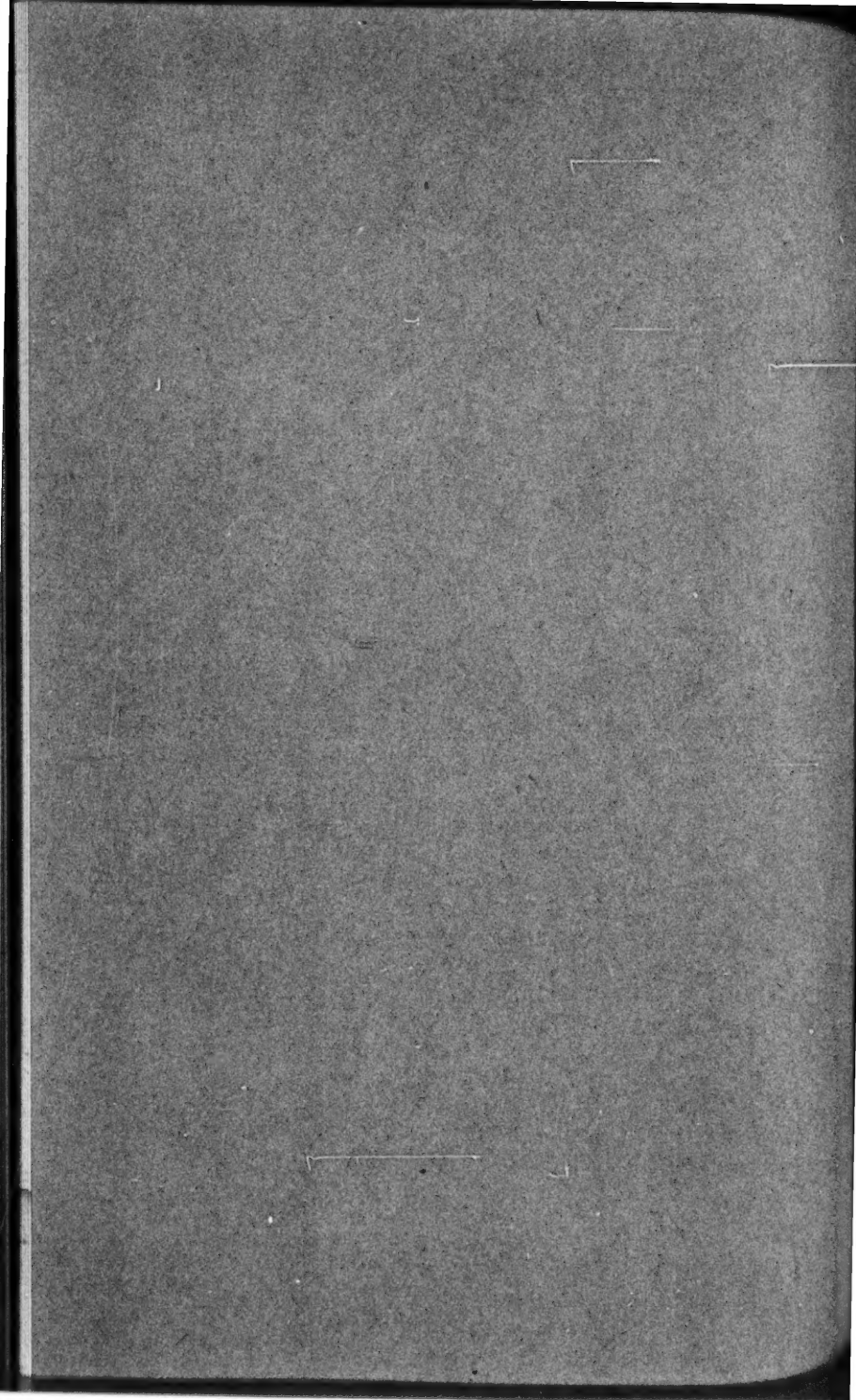
MAT KELLY, DECEASED, - Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 321

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Plaintiff in Error.

vs.

ADDIE KELLY, ADMRX. OF MAT KELLY, DECEASED,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This action has been twice tried to a jury in the Montgomery Circuit Court, State of Kentucky.

On the first trial a verdict was rendered for the plaintiff in the sum of \$18,000. On motion of defendant this verdict was set aside on the ground that the jury had not been directed to apportion the amount of damage due respectively to the several dependents, but had been permitted to find for the plaintiff administratrix a lump sum of \$18,000. Pending this trial in the Montgomery Circuit Court, in spring of 1913, as we recall, the advance sheets containing the opinion of the Supreme Court of the United States in *Gulf, Colorado and Santa Fe Railway Co. vs. McGinnis*, 228 U. S. 173, came to the hands of the judge of that court. In the *McGinnis* case it was for the first time decided by this court that recovery under Employers Liability Act could not be in bulk in favor of a personal representation, but that it was for the jury to apportion amongst the dependents the sums to which they were en-

titled respectively. Acting under the guidance of this opinion, the Circuit Court set the \$18,000 verdict aside and granted the defendant a new trial. Upon a second trial the rule laid down in the McGinnis case was followed resulting in a verdict for \$19,011 upon which judgment was entered, and afterward affirmed by the Court of Appeals of Kentucky.

In a general way and as to features common to all the cases, we have undertaken in a joint brief in the several cases 339-453-478-485 and 743 advanced for hearing with No. 321 (C. & O. v. Kelly) to present our views as to the 7th Amendment to the Constitution.

There are, of course, features peculiar to the Kelly case.

The plaintiff in error did not seasonably present its objection to the jurisdiction of the Montgomery Circuit Court.

The constitutional and statutory provisions prevailing in Kentucky and reflecting upon the matter at hand, are

Constitution of Kentucky, Sec. 7. "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate subject to such modifications as may be authorized by this constitution."

Constitution of Kentucky, Sec. 248. "* * * The General Assembly may provide that in any or all trials of civil actions in the Circuit Courts, three-fourths or more of the jurors concurring, may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by the jurors who agree to it."

Sec. 2268, Kentucky Statutes, carrying out sections 7 and 248 of the constitution provides: "That in all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

There was no objection in the trial court made by plaintiff in error to the jurisdiction of the subject matter. Perhaps if the proposition now urged had been made there, the trial court may have adopted it. It would have been in time if accepted as the correct view, for defendant in error to have chosen another forum in which a trial on the merits could have been obtained; but now it is too late.

Pursuant to the provisions of 2268, Kentucky Statutes, quoted *supra*, the trial court instructed the jury as follows: "(9) Nine or more of the jury may make a verdict, but if less than the whole number agree, all those agreeing must sign the verdict." To this instruction no objection whatsoever was made by plaintiff in error, although it did object to other instructions.

The trial proceeded to a verdict and judgment and thence to the Court of Appeals of Kentucky, where it was affirmed, with still no hint of objection to the jurisdiction of the subject matter, or objection to a three-fourths verdict, and it was never until in a petition for a rehearing in the Supreme Court of Kentucky that we first hear of any objection to the three-fourths verdict, and first hear of the 7th Amendment to the Constitution of the United States, as related to the case.

We submit that plaintiff in error should not be permitted under any circumstances to hold in abeyance a defense of this nature if it is a defense, refuse to advise the trial court of it, at a time when the trial court could have passed upon the question and protected itself, refuse to divulge the matter to the plaintiff in the lower court until it is too late for any other forum to be chosen, and too late for the complainant to protect herself in any way, test out the trial judge, the jury and the Court of Appeals on the merits of the case, and finally when unsuccessful to urge a proposition which properly stood at the very threshold of the case if it had any efficacy at all.

Birney vs. Hain, 2 *Littell* (Ky.), 262, was an action brought

by Hain to recover of Birney the value of a town lot in Lancaster, Garrard County, Kentucky. The action was against Birney on his warranty, but the action was brought in Mercer County, Kentucky, instead of Garrard, where it should have been brought. The case went to the Court of Appeals once and was reversed having been tried in the lower court and passed upon by the higher court without a suggestion as to want of jurisdiction of the subject matter.

After the case was reversed, it was again presented in the lower court for a new trial, but on pleadings that seemed to have been changed somewhat, and at that time Birney attempted to present by demurrer to the declaration, the idea that the Mercer Circuit Court did not have jurisdiction because the lot warranted lying in Garrard County, the jurisdiction was local. The court overruled this contention which the higher court affirmed, saying *inter alia*:

"But there is still another objection to the appellant's availing himself of this matter at this stage of the action. It goes to the propriety of the suit being brought where it is, and defeats the writ itself, on a point which cannot touch the merits; and as the cause has been before this court and reversed in favor of the appellant, and a mandate returned for further proceedings, ought he now to be permitted to travel back to the writ, and avail himself of the objection of which he might have availed himself in the court below on the first trial, and which he might have relied on in this court, when he was first here on a writ of error. It may be said in answer to this, that the objection was apparent to this court on that occasion, and the declaration was brought before the court on demurrer and it ought there to have been decided, and as it was then omitted, he has now a right to present it. If it be admitted that this court could then have reached this question, but omitted to notice it, it does not thence follow that the party would have the right to present it on another occasion. As well might it be said, that having failed to

assign a palpable error on the first occasion, he has a right to bring another writ, and then assign it. It has been the undeviating rule of this court, that when the party has tried his right once on a writ of error, relying on sufficient points, he is presumed to have waived all others, however sufficient they may be."

In *Home for Incurables vs. City of New York*, 187 U. S., 157, the court said:

"It was essential to our jurisdiction in re-examining the judgment of the State court that the alleged conflict between the State law and the Constitution of the United States, 'appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court,' or 'it must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it.' Later cases in this court have expressed the additional thought that if the highest court of the State assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we look no further, and will proceed to the consideration of that question."

We concede, of course, that this court has jurisdiction since it is called upon to interpret the Federal Employers Liability Act. But on the question of the 7th Amendment, the sense of duty of this court to enforce justice would not we apprehend tolerate a practice whereby the point is deferred until too late for a litigant to obtain a forum for the adjudication of his rights.

The practice of a State court deciding on a petition for rehearing a Federal question as a last resort, may be unobjectionable in some cases, but in others, and the *Kelly* case is an example, great injustice may be wrought, where the State court

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assumes that the record presents a Federal question. The State court with very little reason will some times yield its cases to the supervising oversight of this court. But where a party litigant has abundant opportunity to present the Federal question from the very outset of the case to the affirmance by the Supreme Court of the State; and where if this belated contention is sustained a citizen has lost the opportunity of trying her case on the merits, we believe this court would be slow to yield such advantage to one who could, but would not present the question seasonably. It would seem that this court might examine the steps that led the State court to pass on the question now presented, and see if the State court should on the record as there presented have assumed or undertaken to decide the Federal question.

But assuming that a jury of twelve and an unanimous verdict was necessary in the trial of this case, we maintain that the jury of twelve did make the verdict unanimously.

The Court will observe by the Constitution of Kentucky, Section 248, and Kentucky Statutes 2268 quoted supra, there is this paragraph: "But where a verdict is rendered by a less number than the whole jury, it shall be signed by the jurors who agree to it."

The verdict in this case was rendered by the jury through its foreman; there were no signatures of individual jurors as would have been required had the verdict been a majority verdict, and the mere possibility or power on their part to have made a verdict with less than twelve, when it demonstrated that they did not do so, furnished in our judgment a poor basis for a Federal question, and gives accent to the fact that the State court should not have traveled out of its way to decide such question.

The second point urged by plaintiff in error is that the jury were not instructed that their conclusions must be based on a preponderance of evidence. No such instruction was

asked. The jury were told however (instruction Rec. P. 19 and 20): "In this case the jury are instructed to find for the defendant, unless they believe from all the evidence before them. First, that the accident in question was directly and proximately caused by an unsafe condition of the rail over which the engine climbed or by a defective condition of the engine as respects its front driving wheels or the character of the truck, or by a defective condition of the ties at the place of derailment, or by a combination of said conditions, and secondly, that such of said conditions as may have existed were due to a failure on defendant's part to exercise ordinary care in respect thereof."

It is true that in Kentucky we have what is known as the "scintilla rule," but this does not mean at all, that a verdict will be sustained on a scintilla of evidence.

By Civil Code, Ky., Sec. 340, sub-sec. 6, a new trial will be awarded if "the verdict or decision is not sustained by sufficient evidence, or is contrary to law."

Section 341: "* * * Nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence."

Discussing the scintilla rule the Court of Appeals of Kentucky in *Hurst v. L. & N. R. R. Co.*, 116 Ky., 553, said:

"But it does not follow by any means that the rule requiring the submission of a case to the jury if there is a scintilla of evidence means that a verdict may be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence."

And this is the well settled rule in Kentucky.

In *Louisville & Nashville Railroad Co. v. Chambers*, 165 Ky., 703, decided by Kentucky Court of Appeals on September 23, 1915, the court discusses the scintilla rule very interest-

ingly; and holds that it means that there must be evidence upon which a jury may rationally find a verdict for the party producing it. This case was reversed, because the quantum of evidence upon which a jury might rationally find a verdict, was lacking. But this point urged by plaintiffs in error is somewhat like its contention in regard to a majority verdict. It lacks appropriateness; since it is not contended that the recovery by defendant in error was based on insufficient evidence.

INSTRUCTION B.

Plaintiff offered instruction "B," to the effect that if the condition of the rails and the character of the engine, its truck and front driving wheels, at the time of the accident, were such as were generally approved as respects safety by expert men of judgment and experience and knowledge in railway construction and operation, the finding must be for the defendant. It cites *New Galt House Co. v. Chapman*, 124 Ky., 527, in support of that instruction. The case cited was dealing with the construction of a dumb waiter in a hotel. There was not evidence offered in that case that before the accident any other kind of service than the one in use had ever been installed by that defendant or anybody else.

But it is not the law that an employer can allow defective and insufficient railroad equipment as part of his appliances, because he happens to have them on hand, but has on hand others better suited and safer, on the ground that in the opinion of other railroad men the obsolete types are safe enough in their opinion. We have not contended, though, that the rigid truck and bald driver, although obsolete as types in safe use, caused the injury, or were alone negligent. Our contention is and has been all along that the use of such, upon a worn-out track, is and was unsafe. On a sound, good track, doubtless this engine would have kept on the rails. Even though witnesses say that in the opinion of experts in railroad-

ing it is safe to use a worn rail with a rigid truck, the law will not adopt their opinion, and ought not to do so, as the standard of care and duty. The question is, not what other people regard as safe, but what in the light of all the evidence, would a reasonably careful and prudent man do under all the existing circumstances in the view of the possible danger of injury. (Cooley, C. J., in *R. R. Co. v. Van Steinberg*, 17 Mich., 99.) The instruction which was given submitted that standard to the jury. The evidence offered by plaintiff as to what its witnesses thought of such conditions, was heard by the jury. They were not bound to take plaintiff's evidence, which was directly contradicted by our witnesses, as to the safety of those appliances. To have given instruction "B" would have been equivalent to saying to the jury, "You must believe defendant's witnesses, and disbelieve plaintiff's, on the point as to what are safe contrivances and equipment for a railroad." Furthermore, the rule contended for by plaintiff, namely, the standard of care in providing suitable railroad equipment which in the judgment of experienced railroad men is safe, was meant to be departed from by the Congress in the enactment of the Federal Employers' Liability Act. The statute itself clearly expresses that purpose. It provides:

"That every common carrier by railroad while engaged in commerce between the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative for the benefit, etc., * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of defect or *insufficiency* due to its negligence on its cars, engines, appliances, machinery, track, roadbed, ways or works."

Senator Doliver on the floor of the Senate in explaining

the bill declared that one of its express purposes was to modify the doctrine whereby in other generations workmen were held by the court to assume the risks arising from defective machinery. He said, *inter alia*:

"That was an inheritance, I reckon, of the common law, and at the time the courts originally established the doctrine, it had some sense to it and a little justice. There was some reason why a man working with simple machinery should look to it that the machinery with which he worked was in good order. But the doctrine is obsolete as applied to the present day occupations of those workmen who were employed by the common carriers of the world. It would require a brakeman to know all about the machinery of a freight train, though it may be half a mile long, as he goes out upon his day's work. Everybody with a moderate sense of justice must see that the common law applicable to the assumption of risks for deficient machinery has no rational application to the complex industrial concerns of our own time." (60 Cong. Record, 1st Sess., p. 4527.)

The Senate committee said in its report (Senate Report 432, 61st Congress, second session, March 22, 1910, p. 2):

"The passage of the original act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to change radically, as far as congressional power can extend, those rules of the common law which the president, in a recent speech at Chicago, characterized as 'unjust.' President Taft, in his address at Chicago, September 16, 1909, referred 'to the continuance of unjust rules of law exempting employers from liability for accidents.' The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions, and is based not alone upon the failure of those who are in the United States, but their failure in other countries as well."

At the common law, we may concede, a railroad carrier might have justified itself in using obsolete and insufficient type of appliances, so long as they were not in disrepair. Under this statute they are required not only to keep them in safe repair, but provide *sufficient* equipment—sufficient as to its safety—for that was the purpose of the statute. Inadequate appliances, either of cars, engines or track, are condemned, whether from *defect* or *insufficiency*.

PRESENT VALUE THEORY.

Plaintiff contends for the "present value" rule of admeasuring the damages—a rule time and again denied by this court. It cites *Railway v. McGinnis*, 228 U. S., 173, (*supra*), and *C. & O. Ry. Co. v. Dwyer's Admr.*, 157 Ky., 590. Neither case sustains, or squints at supporting plaintiff's argument.

The McGinnis case has already been commented on in this brief. The Dwyer case really sustains our view, and the instructions given in the instant case could not have followed the Dwyer opinion more closely had it been before the draftsman of these instructions. This court used the following language in Dwyer's case:

"The recovery should have been confined by the instructions on the measure of damages, in the event of a finding for plaintiff, to such a sum in damages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence showed they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of defendant, if it was so caused; and after thus finding for the plaintiff a sum sufficient to compensate all the beneficiaries named, it should have been apportioned by the jury among the beneficiaries, stating in their verdict how much, if anything, they found for each of them, the damages altogether not to exceed the amount named in the petition."

Plaintiff strains the occasion and the authorities cited to re-argue what all the railroad litigants for many years have in vain contended for, viz.: that a lump sum should not be awarded, but the *present value* of such lump sum. We pause here to inquire, how is the court to know, in this case for example, that the jury did not do that precise thing?

We will take that question up again in answer to another point in plaintiff's argument.

In *Chesapeake & Ohio Railway Company v. Dixon*, 104 Ky., at p. 613, the jury were told in estimating damages for loss of life of a railroad employe, they might "take into consideration the power of the deceased to earn money." In *L. & N. Railroad Co. v. Morris*, 14 Ky. Law Rep., 466 (not in official reports), it was contended there should be a deduction from the probable earnings of the deceased, the costs of expenses of his living. The court said it "could not well enter into such an inquiry. It would at least involve an investigation of the condition in life of the decedent, and it seems to us, embark the court upon a sea of speculation almost without limit."

In *L. & N. Railroad Co. v. Graham's Admr.*, 98 Ky. 688, the deceased employe was killed by negligence of that appellant's servants on its road in Alabama. The Supreme Court of the latter State had laid down this measure of damages (*L. & N. Railroad Co. v. Trammell*, 93 Ala., 354):

"The true measure of damages manifestly is that which gives her such sum, as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield one hundred and fifty dollars, and as that the whole remaining principal, at the end of the twenty-seventh year, added to the interest on this balance for that year, will equal \$150."

The court will observe this is the "present cash value" theory now being advanced by plaintiff here. In that case

decendent was earning \$630 a year, and his expectancy was 26.72 years. The verdict was for \$6,908.98 under the foregoing instruction—about half of the proven value under the rule obtaining in this State. The court said that even under the Alabama rule it was not excessive, and quoted with approval the opinion in *L. & N. Railroad Co. v. Orr*, 91 Ala., 548, that the jury were entitled to consider the probable duration of life, habits of industry, skill, business, earnings, health and reasonable future expectations of the decendent.

C. & O. Ry. Co. v. Long's Admr., 100 Ky., 221, is a most interesting case on this subject. The argument was in that case pressed upon the court that the jury should have been required to make some deduction for the living expenses of the decendent. Said the court:

"This court has always approved instructions as to the measure of damages that authorized the jury to consider the age of the intestate, his capacity to earn money and the probable duration of his life. The entire question, without any other specific instruction on the subject of the power to earn money has been left with the jury with results that are less harmful to the wrongdoer, and, we think more satisfactory to the court than the rule contended for by learned counsel. * * * We are not disposed to modify in any way the rule in regard to the measure of damages so long adopted by this court."

The judgment was affirmed.

The following instruction was approved in *L. & N. Railroad Co. v. Simrall*, 127 Ky., 55, 104 S. W., 1011:

"And you can consider the age of the intestate, his capacity to earn money, and the probable duration of his life."

The present value theory proceeds upon the notion that a less sum at interest, always well secured, always renewed

promptly, and always paid when due, would yield a sum equivalent to the annual cost of living for the period of the expectancy. But widows and children are not trust companies, and have not the capacity, experience or judgment generally to so invest their funds as to produce such ideal results. No one else has, except in rare instances. At best, verdicts in these cases are approximations. The cost of living today may be, and doubtless will be, increased gradually year by year. The plaintiff and her children, except one, were in normal health at the trial. Computations of cost of maintaining them were based upon the expected continuance of that condition. But if sickness or other adversity overtook them in any year, they would not have been restricted to the "income" allotted that year by the father or husband; he would have anticipated the future, and have relieved them so far as means at his command would allow. The loss is, then, *not so much a year*, as it is so much in the aggregate, using the probable duration and the probable income of the destroyed life as a basis of calculation. There is no provision of law or in the practice authorizing such ruling, and requiring the plaintiffs to *discount* their total loss, in order to get the money now. The loss has been entailed *now*. If the thing to be valued were a horse or a house, no one would advance the contention—that instead of valuing the horse or the house as an entirety now, its probable duration and average income should be used as a basis for an involved calculation of present worth. True, it might be said that the horse or house have a present market value. Which is true. But one is not bound to sell either his horse or house, and may not indeed have any purpose to do so. The basis of valuation in fixing damages for their destruction, is artificial—as is that for valuing the destroyed life. Standards are erected by which it is believed the value of the thing is most nearly ascertained. But in neither instance is the deprived owner required to reduce his property to a "net

worth" or any other discounted basis. One can no more get all the use of his horse or his house at once, than he can of his life. In each instance he would have the horse, the house and the fixed value of the destroyed life at the end of his expectancy, besides having "used" them all the intervening years. There is no reason, nor public policy, in giving the railroad the benefit of the discount in arriving at the "present value" of the destroyed life that would not apply with equal force in the case of the destroyed horse or house.

Mrs. Kelley was awarded \$7,040. Plaintiff insists not only that she must discount it to its present cash value, but that at a rate of six per cent interest. There is no justification in fact, nor in law, for such an assumption, even if the "cash value" theory were sound. For the court knows that money does not and cannot lawfully net six per cent in these times. If four per cent net be obtained, it is unusually fortunate. Taxes alone will amount to nearly two per cent, not counting agents' commissions, losses, idle periods, etc.

To show that, not only did plaintiff in error urge the identical argument before the jury on the trial, but got the full advantage of it in the verdict, we append a calculation showing the value of the destroyed life, and the pecuniary loss sustained by each dependent member of decedent's family during the period of their dependency only:

Matt Kelly's expectancy, from the life tables (which include *hazardous* and non-hazardous risks) was 22.27 years. His earning capacity proved (and not contradicted) was \$192 a month.

22.27 years at \$2,204 per year	\$49,083.00
Less his personal necessary expenses for same period at \$500 per year	11,135.00
	<hr/>
Net value of destroyed life.....	\$37,948.00

Should be apportioned thus:

Mrs. Kelly, 22 years (she was a year or so younger than her husband and had slightly greater expectancy—but we limit it to his). Cost of maintenance \$500 per year		\$11,000.00
Carroll (age 16), 5 years board and clothing		\$1,000.00
Tuition at school		800.00
		<hr/>
		\$1,800.00
x Less 5x\$76		380.00
		<hr/>
		\$1,420.00
Mat L. (age 12), 3 years at \$200.....		\$600.00
6 years at \$400.....		2,400.00
		<hr/>
		\$3,000.00
x Less 9x\$76		684.00
		<hr/>
		2,316.00
Ruth (age 10), 5 years at \$200.....		\$1,000.00
6 years at \$400.....		2,400.00
		<hr/>
		\$3,400.00
x Less 11x\$76		836.00
		<hr/>
		2,564.00
x Tom J. (age 8), 13 years at \$500....		\$6,500.00
x Less 13x\$76		988.00
		<hr/>
		5,512.00
Richard (age 3), 12 years at \$200		\$2,400.00
6 years at \$400.....		2,400.00
		<hr/>
		\$4,800.00
x Less 18x\$76		1,366.00
		<hr/>
		5,434.00
Total		<hr/>
		\$28,246.00

(x The evidence shows decedent owned tenements

which yielded gross \$48 per month per year	\$576.00
We deduct 20 per cent. for taxes, insurance, repairs and losses	115.00
	<hr/>
	\$461.00
Less Sylvester's share of 1-16	77.00
	<hr/>
	\$384.00

To be divided among five infants, \$76.00 each.)

(x The evidence showed it would cost this much more to support this afflicted child. His malady is incurable—is congenital. The court should have indicated that his dependency was not limited to the age of twenty-one years.)

Yet we see the jury discounted this *proven* actual pecuniary loss over \$9,000, which appellant has already got the benefit of.

The court will also notice that the sum awarded in the aggregate is about one-half the probable value of decedent's life. So the jury did take into consideration the "hazardous nature of his employment," as affecting the probable duration of his life, as well as discounted the result to get at a cash value. At any rate, plaintiff is clearly safe in the figures on those scores.

The verdict is now set down as compared with the proven pecuniary loss sustained by each dependent member of decedent's family:

	As shown by the proof.	The verdict.
Mrs. Addie Kelly	\$11,000.00	\$7,040.00
Carroll Kelly	1,420.00	1,288.00
Mat L. Kelly	2,316.00	1,580.00
Ruth Kelly	2,564.00	2,273.00
Tom Kelly	5,512.00	4,371.00
Richard Kelly	5,434.00	2,459.00
	<hr/>	<hr/>
Totals	\$28,246.00	\$19,011.00

POINTS AND AUTHORITIES

Constitution of Kentucky, Secs. 7 and 248.

Kentucky Statutes, Sec. 2268.

Objection to jurisdiction should have been seasonable.

Birney v. Haine, 2 Littell (Ky.), 262.

Home for Incurables v. City New York, 187 U. S., 157.

The verdict was sustained by the preponderance of evidence.

Civil Code (Ky.), Secs. 340-341.

Hurt v. L. & N. R. R. Co., 116 Ky., 553.

L. & N. R. R. Co. v. Chambers, 165 Ky., 703.

Instruction B offered by Plaintiff in Error was erroneous.

R. R. Co. v. Steinburg, 17 Mich., 99.

60 Cong. Record, 1st Sess., p. 4527.

Senate Report 43261 Congress 2nd Sess., Mch. 22, 1910,
p. 2.

Present Value Theory.

C. & O. v. Dixon, 104 Ky., 613.

L. & N. v. Morris, 14 Ky., L. R., 466.

L. & N. R. Co. v. Graham's Admr., 99 Ky., 688.

L. & N. R. R. Co. v. Trammell, 93 Ala., 354.

L. & N. R. R. Co. v. Orr, 91 Ala., 548.

C. & O. Ry. v. Long's Admr., 100 Ky., 221.

L. & N. R. R. Co. v. Simrall, 127 Ky., 55.

APR 4 1916

JAMES D. MAHER

CLERK

Supreme Court of the United States

OCTOBER TERM, 1915

CHESAPEAKE & OHIO RAILWAY CO.

v. } No. 321

KELLY'S ADMINISTRATRIX.

ST. LOUIS AND SAN FRANCISCO RAILROAD CO.

v. } No. 399

H. A. BROWN.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

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SARAH DWYER, AS ADMINISTRATRIX, ETC.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

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THE CHESAPEAKE & OHIO RAILWAY COMPANY

v. } No. 743

ASA P. CARNAHAN.

JOINT BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR ON EN-
FORCEMENT OF RIGHTS ARISING UNDER FEDERAL EMPLOY-
ERS' LIABILITY ACT IN STATE COURTS, WHOSE PROCEDURE
DOES NOT COMPLY WITH THE SEVENTH AMENDMENT.



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Upon motion of plaintiffs in error, this Court has directed that the above cases be heard together, because of the suggestion that there was one important question common to

them all. For the convenience of the Court, it has been thought conducive to clearness that the defendants in error should unite in this joint brief with relation to the fundamental question, without prejudice to any of the defendants in error who may prefer to present the points peculiar to their individual cases by separate briefs. *Indeed it is appropriate that the Court should be advised, in the out set, that some of the defendants in error will urge, by their separate briefs that the constitutional question was so raised or that the trial was so conducted in their individual cases as to render the same immaterial to favorable decision by this Court in their individual cases as presented; and, therefore, the attention of the Court is expressly invited to the separate briefs of counsel for defendants in error.*

(a) Abstract of the Cases.

In No. 321, *The Chesapeake and Ohio Railway Company v. Kelly's Administratrix*, the plaintiff in error has objected to the jurisdiction of the Circuit Court (for the first time by petitions for rehearing in Supreme Court of Kentucky) because under the law of Kentucky, Kentucky Statutes, section 2268, three-fourths or more of the jurors may return a verdict, which has the same force and effect as if rendered by the entire panel. It affirmatively appears by the decision of the Court of Appeals of Kentucky and by the record in the case, however, that the verdict was the unanimous verdict of a jury composed of twelve men.

In No. 399, *St. Louis and San Francisco Railway Company v. H. A. Brown*, it is objected that the trial court erred in instructing the jury, in accordance with the state law, that nine jurors could return a verdict.

In No. 453, *The Chesapeake & Ohio Railway Company v. Dwyer's Administratrix*, the jurisdiction of the Circuit Court of Kentucky is attacked, by petition for rehearing in Appellate Court, on the ground that the verdict may be rendered

under the state law of Kentucky by three-fourths of the jurors. The petition was overruled without response.

In No. 473, Minneapolis, etc., *R. Co. v. Bombolis*, the jurisdiction of the courts of Minnesota is attacked because five-sixths of a jury of twelve may find a verdict.

In No. 485, Louisville & Nashville Railroad Company *v. Stewart's Administratrix*, to be considered with No. 904, *Stewart's Administratrix v. Said Railroad Company*, by cross writ the administratrix seeks to have reinstated a judgment rendered on the first trial, while in No. 485 the Railroad Company seeks to have reversed judgment entered on the second trial. The record of each trial affirmatively shows that the verdict was unanimous and rendered by a jury composed of twelve men.

In No. 743, Chesapeake & Ohio Railway Company *v. Carnahan*, the plaintiff in error, who was the defendant in the trial court challenged the array of jurors and moved to quash the venire facias, because it was not selected as required by the Seventh Amendment. The jury consisting of seven jurors impanelled under the law of Virginia, was, it is admitted, constituted in accordance with section 3166 of the Code of Virginia, and the case could be tried in no other manner, except for some peculiar reason. See opinion of Judge Cardwell, record, page 72.

(b) Statement of Contention of Plaintiffs in Error.

Thus in all these cases is presented the common question whether State Courts in such of the states as have jury trials by fractional verdicts or by less than a common law jury, could take jurisdiction of causes of action arising under the Employers' Liability Acts, or more broadly, of causes of action arising under an Act of the Congress of the United States. It is insisted that the rights here asserted are federal rights created by the Congress of the United States, and can be tried only by the common law jury of twelve, required by the Seventh Amendment to the Constitution.

Of course for purposes of this discussion only, it is assumed

that the question is properly presented for determination by this court. In certain of the cases particularly Nos. 321 and 453, it is insisted by defendants in error that inasmuch as this proposition was not attempted to be presented until a petition for rehearing was offered after the Supreme Court of the state had affirmed the judgment of the lower court, the question was not seasonably presented, i. e., at a time when the lower court, could, if so minded, have accepted the view of the plaintiffs in error, or when the defendant in error could have protected his rights from loss by lapse of time. This point is elaborated in the separate briefs.

In the opinions in cases numbers 321, 399 and 743, this subject has received somewhat elaborate treatment from the courts of Kentucky, Oklahoma and Virginia, respectively, and the discussion which follows is of course placed upon the soundness of the views there expressed, although as those opinions are a part of these records, it has not been thought wise to quote at length from them.

(c) Scope of Contention of Plaintiffs in Error.

If this contention be sound, it follows that no federal rights may be asserted in the courts of states whose procedure does not provide a jury of twelve men and require an unanimous verdict. Then the provisions of the Employers' Liability Act as amended by the Act of April 5, 1910, section 6, to the effect that the Federal Courts have concurrent jurisdiction with the State Courts and that no case brought in a State Court shall be removed to a Federal Court, are meaningless. And further the general provisions of the Judiciary Act regarding removals which recognize the jurisdiction of the State Courts, are also meaningless, for these State Courts have, according to this contention, no jurisdiction to try any case.

And more startling still is the result that no court has jurisdiction to try cases where the amount involved is less than \$3,000.00. For the State Courts are not, according to this

contention, competent and the Federal Courts have no jurisdiction over cases where the amount involved is less than \$3,000.00. This result is mentioned by District Judge Neterer in *Gibson v. Billingham and N. R. R. Co.*, 213 Fed. 488, and from it he well concludes that the contention is wholly at variance with the genius of the relation of federal rights and the judiciary of the states.

Furthermore, as the objection is to the jurisdiction of the tribunal as not organized in accordance with the requirements of the federal constitution in the organization of courts of justice, not only the absence of a common law jury, but other federal requirements will exclude the State Courts from jurisdiction. The Constitution Article III, section 1, requires that federal judges hold office during good behavior and protects them against diminution of salary during continuance in office. This feature of the Federal judiciary has been treated as very important. See *The Federalist*, No. 79, and opinion of Mr. Chief Justice Marshall in *Cohens v. Va.*, 6 Wheat. 264, page 386. It follows that a court whose judge holds office only for a limited number of years or whose salary is not so protected, could not try cases arising under the federal laws. It would not be a court constituted as Federal Courts under the Constitution must be constituted.

It will thus be seen that the proposition here presented is very far reaching in character, in defining the jurisdiction of State and Federal Courts.

ARGUMENT PROPER.

It is submitted that this contention is based on a mistaken view of the relation between rights created by the Congress of the United States and the judiciary of the United States. A right created by a sovereign is wholly independent of the judiciary of the sovereign. Other sovereignties recognize the right and enforce it according to the procedure of their own judiciary wholly without reference to the procedure of the

judiciary of the sovereign creating the right. For instance, a right created by statute of Massachusetts will be enforced in Kentucky or Minnesota or Oklahoma or Virginia in accordance with the procedure of such courts. And the courts enforcing that right will not inquire whether in Massachusetts a jury of twelve is required (as we are informed is the fact) or a jury of seven. The right is wholly independent of the judiciary, which is provided to enforce it. The question involved in the contention here presented by counsel for plaintiffs in error may be concretely put thus: Is it essential to the enforcement in a State Court, of the federal law, that provisions of the federal constitution regarding the administration of law, be followed? Or, in other words, does the enforcement of a federal right differ from the enforcement of rights created by other sovereignties than the United States, in that it draws with it the necessity of enforcement in the manner prescribed by the the federal constitution for the administration of justice in Federal Courts?

The discussion of this question involves the consideration of (1) the enforcement of federal rights in a State Court and (2) the application of the Seventh Amendment to proceedings in a State Court.

1. THE ENFORCEMENT OF FEDERAL RIGHTS IN A STATE COURT.

(a) Federal Rights Are Enforced in a State Court as a Subject of Litigation between Parties before It.

Rights created by the Congress of the United States become a subject of litigation between parties and are enforced as a basis of liability in the same manner as are other rights subsisting between litigants. The United States is a sovereign possessing all the attributes of sovereignty, though exercising its sovereignty over a limited subject matter. One of the attributes of sovereignty is the authority to create rights and obligations between persons amenable to its jurisdiction.

Those rights once created in no way differ from rights created by any other sovereignty. It is true that owing to the peculiar relation between the national and state government, the national and federal government may exclude the State Courts from the exercise of jurisdiction over federal right, but in the absence of such restriction, federal rights are enforceable in any court having jurisdiction of the parties.

In the *Federalist* No. 82, the relation of the State Courts to rights created by the Congress of the United States is thus explained:

"I do not mean, therefore, to contend that the United States in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the Federal Courts, solely, if such a measure should be deemed expedient; but I hold that the State Courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am of opinion that in every case in which they were not expressly excluded by the future actions of the national legislature, they will, of course take cognizance of the cause to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, although the causes of dispute are relative to the laws of the most distant parts of the globe. Those of Japan not less than those of New York may furnish the objects of legal discussion to our courts. When in addition to this we consider the state government and the national governments as they truly are, in the light of kindred systems, and as parts of one whole the inference seems to be conclusive that the State Courts would have concurrent jurisdiction, in all cases arising under the laws of the Union, where it is not expressly prohibited."

In *Clafin v. Housman*, 93 U. S. (3 Otto) 130, 23 L. Ed.

833, 838, the Court thus defined the relation of the State Courts to federal laws:

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman v. Booth*, 21 How. 506 (62 U. S. XVI, 169); and hence the State Courts have no power to revise the action of the Federal Courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State Courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

Mr. Justice Bradley then discusses the views presented by Alexander Hamilton in 82nd number of the *Federalist*, commending them. And he continues:

"These views seem to have been shared by the first Congress in drawing up the Judiciary Act of September 24, 1789, 1 Stat. at L. 73; for, in distributing among the various courts created by that Act, there is a constant exercise of the authority to include or exclude the State Courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the State Courts retained their usual jurisdiction concurrently with the Federal Courts invested with jurisdiction in like cases."

In the *Second Employers' Liability Cases* (*Mondou v. N. Y. N. H. & H. Ry. Co.*), 223 U. S. 1, 56 L. Ed. 327, the Court reviewing the action of the State Court of Connecticut in refusing to enforce the Act, because not in harmony with the policy of Connecticut, said:

"Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts,

or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are Courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant. * * * We are not disposed to believe that the exercise of jurisdiction by the State Courts will be attended by any appreciable inconvenience, or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

These authorities explain very clearly how that rights arising in federal laws are enforced by State Courts. It is because they constitute a subject matter of litigation between the parties. The duty to enforce rights arising under law, arises not in authorization from the legislature creating the rights, but in the scope of jurisdiction of the court, granted to it by the legislature in constituting it. Rights arising under any law must be enforced in courts of general jurisdiction, not because the law creating the rights authorized its enforcement in that particular court, but because it is the nature of courts to enforce rights. Else rights arising under the laws of Massachusetts would not be enforceable in other states, for

Massachusetts has no authority to legislate as to the enforcement of rights outside its borders. But such rights are enforced because the subject matter of litigation. The parties have come into court with certain rights subsisting between them, and it is the duty of the court as defined in its jurisdiction, i. e., the scope of its cognizance, to determine the case, enforce the rights, whether emanating from the legislature of the state, the Congress, the legislature of a sister state, or a foreign country. And this being true, it follows that cases involving rights created by federal laws are to be enforced in the State Courts in the ordinary, customary mode of procedure and in the method of trial prescribed by state laws.

But counsel for plaintiffs in error insist that the enforcement of rights under federal laws differs from the enforcement of laws of a foreign sovereignty in that federal laws are the laws of the several states, and for that reason require enforcement agreeably to the methods provided for Federal Courts. (Brief, pp. 7-10). The authorities above referred to and quoted, have not so viewed the matter. But we shall examine these contentions in detail.

**(b) That Federal Laws Are Laws of the Several States
Does Not Change the Nature of Jurisdiction
of the State Courts.**

Of course at this day no one would contend that federal laws are not laws of the state. And because the federal laws are the laws of the several states, there arises this distinction in the manner of enforcement of federal rights from the manner of enforcement of rights arising under foreign law, that in the former, proof of the law is not required nor is an inquiry into the policy of the law permitted, both of these features however, apply to the latter. But this is the only distinction, and it is not obvious how this distinction so affects the nature of state jurisdiction as to require enforce-

ment there of the methods prescribed for Federal Courts. It would seem that because federal laws are the laws of the state is the more reason why cases arising under them should be enforced in the same manner that obtains in the enforcement of other state laws.

The argument appears to be that as federal laws are the law of the state, therefore State Courts in enforcing such law are Federal Courts. This might be true if rights arising under a statute could be enforced only in the courts of the sovereign creating the right. It might then be said that when State Courts enforce federal laws they take on the character of Federal Courts. But courts enforce rights irrespective of their origin. It is not necessary to the enforcement of federal law that the court administering it be a Federal Court. The Virginia Court in enforcing Massachusetts law does not become a Massachusetts court. Counsel overlooks the difference between legislative power and judicial cognizance. It is not essential to jurisdiction that the court exercising jurisdiction should be amenable to the authority of the sovereign creating rights on which jurisdiction is to be exercised. The duty of the courts of the states to enforce federal rights does not grow out of responsibility to the federal government, nor is it a duty imposed by federal law. That duty is inherent in the nature of jurisdiction, and is derived from the state, though it relate to federal laws.

In Black's Law Dictionary we find Jurisdiction defined thus:

"The authority of a court as distinguished from the other departments; judicial power considered with reference to its scope and extent as respects the questions and persons subject to it; power given by law to hear and decide controversies. Abbott.

"Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them. 12 Pet. 657, 717."

And the nature of jurisdiction as dependent upon state

law is brought out in the Mondou case, *supra* where Mr. Justice Van Devanter says:

"* * * we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts, or to control or affect their modes of procedure, but only a question of the duty of such court when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws to take cognizance of an action to enforce a right of civil recovery arising under an Act of Congress."

This duty to enforce the federal laws must be found in the jurisdiction "prescribed by local laws," for the court inquires and

"is advised by decisions of the Supreme Court of Errors that Superior Courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death * * * not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery * * *."

Perhaps in no case is the distinctiveness of the sovereignties, state and federal, in relation to their courts more clearly developed than in *Clafin v. Houseman*, *supra*, where Mr. Justice Bradley says:

"Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in that state; concurrent as to place and persons, though distinct as to subject matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws, may be prosecuted in the State Courts, and also, if the parties

reside in different states, in the Federal Courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in the State Courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal Courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 429 (71 U. S. XVIII, 401), and Story, J. In *Martin v. Hunter*, 1 Wheat. 334, and Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236 (80 U. S. XX, 634). * * *

Here also the authority, i. e., the duty to determine, is said to arise in state law, for the inquiry is whether such court is "competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction." And whether a court is competent is determined, not by its methods of trial, but by the scope of its jurisdiction as prescribed by local laws.

There is no blending of sovereignties in the enforcement of rights. The duty to enforce arises in the nature of jurisdiction, in the function of the judiciary, not in the power to legislate. Then the contention that, because federal laws are the law of the state, federal methods of trial governing the federal judiciary must be pursued in the enforcement of federal rights, falls. For the duty to enforce those laws arises, not in the federal law which created the right, but in the state law which constituted the court and defined its jurisdiction. It is because the federal rights are the subject matter of litigation that they are enforced in State Courts, and they are to be determined as any other subject matter of litigation is to be determined, in accordance with the usual methods of trial obtaining in State Courts.

This discussion cannot be better stated than in the words of Judge Neterer in *Gibson v. Bellingham and N. R. R. Co.*, 213 Fed. 488. In that case it was contended that a case

brought in a court whose procedure did not require an unanimous verdict could be removed to a Federal Court as not being removed from a court of competent jurisdiction, and therefore not within the clause of the Liability Act inhibiting removal.

Held: "It appears from the decisions of the Washington Supreme Court that the Superior Courts may take cognizance of the actions for personal injuries, and that actions for such injuries are brought and tried not only when the injury occurred within the state but where the right of action arose outside the state. In the latter event, the right of the plaintiff to recover is determined by the laws of the state where his injury was sustained, but the rules of procedure and methods of trial employed are those of the tribunal whose aid is invoked. * * *

"There is no sound distinction why the principle should be different when a right of action created by a federal statute is sought to be enforced in a State Court. The right of trial by a jury of twelve, where the assent of all is necessary to a verdict, is but a method of trial prevailing in the Federal Courts. The fact that it is prescribed by the Federal Constitution does not change its essential character. It was intended to regulate the procedure of trials in the Federal Courts, not to be annexed as a condition to the enforcement of a right of action. A State Court of general jurisdiction may enforce a right created by federal laws, where exclusive jurisdiction is not vested in the Federal Courts. Not only is this true, but it is the duty of a State Court to observe and enforce rights created by federal laws."

Thus it seems clear that federal rights are enforceable in State Courts because a subject of litigation between parties amendable to the jurisdiction of the state, and it follows that unless in some other feature of our coördinated system of government than in the fact the federal laws are the laws of the several states, federal methods of trial need not be provided in State Courts for the trial of cases arising under federal law.

(c) Federal Rights Are Not Enforced in State Courts by a Delegated Authority from the Federal Government.

The authorities cited above show that the exercise of jurisdiction by State Courts over cases arising under federal law is not based upon delegated authority, but arises in the nature of courts of general jurisdiction. Moreover, the Congress cannot vest in State Courts any judicial power of the United States.

That the Congress of the United States cannot vest judicial power in the courts of judicial officers of the several states has been recognized as settled since the decision in *Martin v. Hunter* (14 U. S.) 1 Wheat. 304, 330; 4 L. Ed. 97, 103, when Mr. Justice Story said:

"Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself."

See *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715.

In connection with the right of the Supreme Court on writ of error to the State Court, to revise a judgment in the State Court, it was argued that such right implied that the two systems must, under such a system, be combined. But in *Cohens v. Virginia*, 6 Wheat. 264, 421, 5 L. Ed. 257, 295, wherein it was settled that an appeal might be prosecuted from the State Court to the Federal Court, this argument was discountenanced, and it was held that this right of appeal did not involve any change of view as to the source of authority of the state judiciary, or the federal judiciary. Mr. Chief Justice Marshall said (p. 421; L. Ed. p. 295):

"In opposition to it (construction permitting review of federal question by Federal Court on writ of error), the counsel who made this point has presented in a great variety of forms the idea already noticed, that the Federal and State Courts must, of necessity, and from the nature of the Constitution be in all things totally distinct and independent of each other. If this court can

correct the errors of the courts of Virginia, he says it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia.

"But it has been already shown that neither of these consequences necessarily follows. The American people may certainly give to a national tribunal a supervising power over those judgments of the State Courts, which may conflict with the constitution, laws, or treaties of the United States, without converting them into Federal Courts, or converting the national into a state tribunal. *The one court still derives its authority from the state, the other still derives its authority from the nation.*" (Italics ours).

And in *Martin v. Hunter*, 1 Wheat. 304, 342, 4 L. Ed. 97, 106, Mr. Justice Story said:

"It must therefore be conceded that the Constitution not only contemplated but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, State Courts could incidentally take cognizance of cases arising under the constitution and laws and treaties of the United States. Yet to all these cases the judicial power by the very terms of the constitution is to extend. *It cannot extend by original jurisdiction if that was already rightfully and exclusively attached, in the State Courts, which (as we have already shown) may occur; it must therefore extend by appellate jurisdiction or not at all.*" (Italics ours).

And Hamilton in the *Federalist* was of the same view, that the right of appeal to the Supreme Court would not affect the character of the jurisdiction of State Courts over causes of action arising under federal law. For in the 82nd *Federalist* he discusses both ideas, and after explaining the manner in which State Courts would take cognizance of federal rights, as quoted above in this brief, page 7, further shows that the Supreme Court should, under the Constitution, have appellate jurisdiction in the paragraph quoted in

the Brief of Plaintiffs in Error, p. 27. Certainly it was not his view that State Courts would take jurisdiction of causes of action growing out of federal laws, by virtue of some delegated authority as federal agencies, because a right of appeal lay to the Federal Court. Had that been his view, he would hardly have argued that the State Courts take jurisdiction "from the nature of the judiciary power," in the same paper in which he argued that the Supreme Court, under the Constitution, would have power to review judgments of State Courts. On the contrary, this 82nd Federalist plainly shows that the appellate power in the Supreme Court does not involve any change in the nature or Constitution of the State Courts.

It is true that the State Courts are, as Hamilton says "natural auxiliaries to the execution of the laws of the Union." For it was known that they existed throughout the United States, and under the law would be open to the adjudication of causes involving federal laws. But as has been shown, that fact does not imply that they exercise a delegated authority. It is only by delegated authority that the provisions of the Seventh Amendment can be made applicable to State Courts.

The Act in question (Employer's Liability Act) in its own terms shows that the jurisdiction of the State Courts is not a delegated jurisdiction. It recognizes an independent jurisdiction in State Courts. It confers jurisdiction on the Federal Courts. The Paynter amendment is as follows: Section 6

"* * * The jurisdiction of the courts of the United States, under this act, shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

The clause inhibiting removal is a limitation on the jurisdiction of the Federal Courts. The clause relating to juris-

diction of State Courts is a mere recital and the language could hardly be construed as a mode of expressing a grant of jurisdiction, especially as in the same clause is an express grant of jurisdiction to Federal Courts. If it had been the purpose of Congress to grant jurisdiction to State Courts, the simple phrase, "United States Courts and State Courts shall have jurisdiction" would have sufficed. So that if State Courts take jurisdiction over federal rights only by delegated authority, it might be appropriately urged that they have no jurisdiction over causes of action arising under this act.

But it has been repeatedly recognized, it is part of our jurisprudence that State Courts take jurisdiction of all causes of action arising under federal laws, unless that jurisdiction has been excluded.

To illustrate: Copyrights are created by laws of the United States. Rights arising under the National Banking Act are likewise created by Congress. Yet the State Courts enforce them, in the latter cases exclusively so far as their federal creation are concerned.

The Interstate Commerce legislation of Congress covers a wide and constantly widening field. Among its many provision creating entirely new rights and personal liabilities are the Safety Appliance Acts and the Amendment of 1906, known as the Carmack Act.

And the Courts have taken jurisdiction in all such cases, without reference to any express or implied grant of jurisdiction. See *C. N. O. & Ry. Co. v. Griggs* (Ky.) 80 S. W. 512 (Not officially reported); *Ill. Centr. R. R. Co. v. Curry*, 127 Ky. 643; *Ill. Centr. R. R. Co. v. Eblin*, 114 Ky. 814; *McElvain v. St. L. and San F. R. R. Co.* (Mo.), 131 S. W. 736; *West. Union Tel. Co. v. Bilisoly*, 116 Va. 562; *So. Ry. Co. v. Jacobs*, 116 Va. 189; *L. & N. R. R. Co. v. Scott*, 133 Ky. 724, affirmed 219 U. S. 209; 55 L. Ed. 183. And of course they must do so, as has been held in *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 48, 58 L. Ed. 838;

Kansas City Western R. Co. *v.* McAdow, Adv. Ops. 1915, p. 252.

Thus we see that Congress instead of conferring jurisdiction on the State Courts, recognized that they already had, or would have such jurisdiction without express federal consent. There is no necessity for seeking a delegated authority to explain the propriety of the jurisdiction of State Courts. The state law will be enforced in Federal Courts in cases where Congress has created a jurisdiction suitable to such cases; (*Greely v. Lowe*, 155 U. S. 75); rights arising under a statute of Tennessee or an act of Parliament will be enforced in the courts of the Kentucky and every other state. In none of these cases does the sovereignty creating the right confer jurisdiction. For a State Court cannot confer jurisdiction on a Federal Court, nor could the legislature of Tennessee or the Parliament of Great Britain confer jurisdiction on the courts of Kentucky. Yet this jurisdiction is universal, not as a matter of friendly interchange of courtesy, but as a duty arising in the common law of jurisdiction.

(d) The Analogy between Territorial Courts and State Courts.

That the provisions of the Seventh Amendment are applicable to the judiciary of the territories, and the District of Columbia, does not show that those provisions must be followed in State Courts, in trying cases involving federal laws. The United States has created those courts by virtue of its authority as sovereign of the territory and of the District. But the United States has not created State Courts. The reason the Seventh Amendment applies to the territories and the District is that the United States is sovereign and the Seventh Amendment is binding upon the United States in creating its judiciary. The reason does not lie in the fact that the courts of the territories are enforcing federal law.

In *Capital Traction Co. v. Hof*, 174 U. S. 1, 5; 43 L. Ed. 873, 874, it is said:

"The Congress of the United States, being empowered by the Constitution to exercise exclusive legislation in all cases whatsoever' over the seat of national government, has entire control over the District of Columbia, for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a state might exercise within the state, and may vest and distribute the judicial authority in and among courts and magistrates and regulate judicial proceedings before them as it may think fit, so long as it does not contravene any provision of the Constitution of the United States."

In *Thompson v. Utah*, 170 U. S. 343, 348, 42 L. Ed. 1061, 1066, wherein it is held that the provisions of the constitution regarding trial in criminal prosecutions apply to territorial courts, quotes from *Murphy v. Ramsey*, 114 U. S. 15, 44, thus:

"The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to which all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution or are necessarily implied in its terms."

And in *Am. Ins. Co. v. 356 Bales of Cotton* (26 U. S.) 1 Pet. 511, 546, 7 L. Ed. 242, 256, it is said:

"These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

It is of course true, as said in the case last cited, as well as in the other cases cited on this point in Brief of Plaintiffs in

Error, that "territorial courts are not courts of the United States within the meaning of the Constitution." But it is also true that they are not State Courts. That the Seventh Amendment is applicable to trials in territorial courts does not lead to the conclusion that it is also applicable to trials in State Courts unless the two kinds of court have in common the feature on which the applicability to territorial courts is based. That feature is that territorial courts are created by the United States, and the Amendments to the Constitution are binding upon the United States in the organization of a judiciary in territory incorporated into the United States. But that feature is wholly absent in the organization and exercise of jurisdiction by State Courts. Territorial courts are genuine federal agencies for they are created by the United States for the government of the territory. State Courts are not federal agencies for they are not created by the United States and do not exercise their jurisdiction in the United States territory. It is not the subject matter of the litigation, the *casus foederis*, in the phrase of counsel, which renders applicable the Seventh Amendment, but the constitution of the court, and its territorial jurisdiction over United States land. For in all classes of cases the courts of the territories are obliged to pursue the method of trial prescribed in the Amendment. If the subject matter determined the application of the Seventh Amendment, then territorial courts would be obliged to adopt that method only in those cases which involved federal rights. The analogy is thus seen to be wholly inapt.

Thus it will be seen that State Courts take cognizance of these cases not by the authority of the enacting power, but in the exercise of their general jurisdiction, in the same manner in which they take cognizance of the laws of New York or Great Britain. The only differences are that it is not necessary to prove the law as a foreign law because it is not a foreign law, and the State Courts cannot enter into a consideration of the relation of the laws to the policy of the state, as they may do in the case of strictly foreign laws.

As the State Courts recognize and give effect to the federal laws as forming foundations for litigation between persons amenable to their jurisdiction, it follows that the procedure of the State Courts is in accordance with the law of the state. The litigation is determined under the procedure provided by the state.

Therefore, unless inhibited by the provision of the Constitution or laws of the United States, the State Courts may enforce the federal laws according to procedure provided by the state, without reference to the provisions of the federal law relative to procedure in Federal Courts. The inquiry regarding that inhibition is our second question.

2. THE APPLICATION OF THE SEVENTH AMENDMENT TO PROCEEDINGS IN A STATE COURT.

(a) The Seventh Amendment Applies to the Federal Judiciary Not to Federal Rights.

The Constitution proper contains nothing which by any possibility could be construed as an inhibition on the State Courts, or as prescribing the procedure to be adopted in enforcing federal rights. The Seventh Amendment was proposed to the several legislatures by an Act of Congress passed at the First Congress, September 25, 1789. This was the day following the passage of the Judiciary Act creating federal tribunals inferior to the Supreme Court. This Act of September 24, 1789, first created trial courts. Until then, federal laws were, of course, enforceable solely in the State Courts. On the day following, the act subsequently embodied in the first ten amendments, was passed. This is a very significant fact in determining the application of the Seventh Amendment to State Courts, whether they are taking cognizance of federal or state laws. For it necessarily requires the inference that it was made necessary by the creation of federal trial courts, and applies to them only.

In *Barron v. Baltimore*, 7 Pet. 242, 8 L. Ed. 672, 674, 675, the application of these amendments to the states was first considered. The court speaking by Marshall, C. J., said of the Fifth Amendment:

"The Constitution was ordained and established by the people of the United States for themselves for their own government, and not for the government of the individual states. Each state established a constitution for itself and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power if expressed in general terms are naturally, and we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

After discussing the language of the amendments, Mr. Chief Justice Marshall continues:

"Had the people of the several states or any of them required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands and would have been applied by themselves. A convention would have been assembled by the discontented states and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister states could never have occurred to any human being as a mode of doing that which might have been effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original

constitution and have expressed that intention. Had Congress engaged in that extraordinary occupation of improving the constitution of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

"But it is universally understood, it is part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against apprehended encroachments of the general government, not against those of the local government."

Walker v. Sauvinet, 2 Otto (92 U. S.) 90, 23 L. Ed. 678, 679, presents the counter part of *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, so much relied on by counsel (Brief pp. 17 and 19). In *Walker v. Sauvinet* was involved the validity of a judgment in a State Court entered by a judge without a verdict, in accordance with a statute of Louisiana permitting judgment without a verdict in case the jury failed to agree. The *Slocum* case presented similar facts but trial had been in Federal Court. Mr. Chief Justice Waite said:

"This (Seventh Amendment) as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott*, 21 Wall. 557. The states so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden

by the 14th Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken, etc., Co.*, 18 How 280, 15 L. Ed. 276. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States, Art. VI Constitution. Here the State Court has decided that the proceedings below was in accordance with the law of the state, and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

In *Brown v. N. J.*, 175 U. S. 172, 44 L. Ed. 119, 120, where was called in question the constitutionality of the law of New Jersey providing a "struck" jury in felony cases, Mr. Justice Brewer said:

"The first ten amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on the Federal Government. (Citing many cases.) The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. * * * The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations hereinbefore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

In *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597, the

validity of a verdict of a jury of eight in a felony case came under review. The Court said:

"In order to limit the powers which it was feared might be claimed or exercised by the federal government under the provisions of the Constitution, as it was when adopted, the first ten amendments to that instrument were proposed to the legislature of the several states by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the general government, and were not intended to, and did not have any effect upon the powers of the respective states. This has been many times decided. The cases herewith cited are to that effect, and they cite many others which decide the same matter. *Spies v. Illinois*, 123 U. S. 131, 166, 31 L. Ed. 80, 86, 6 Sup. Ct. Rep. 21; *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, 174, (ante, 119) 20 Sup. Ct. Rep. 77 * * * These cases show the meaning which the courts have attached to the expression, as used in the Fourth Article of the Constitution, and the argument is not labored which gives the same meaning to it when used in its Fourteenth Amendment.

"That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions. But, as said in the Slaughter House Cases, the protection of the citizen in his rights as a citizen of the state still remains with the state. This principle is again announced in the decision in *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, wherein it is said that sovereignty for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase "privileges and immunities" of citizens of the United States, which the states by reason of the 14th Amendment cannot in any manner abridge, then the sovereignty of the state in regard to them has been entirely destroyed, and the Slaughter-

House Cases and *United States v. Cruikshank* are all wrong, and should be overruled."

See also, *Pearson v. Yewdell*, 95 U. S. 294; *Ohio v. Dolison*, 194 U. S. 447; *Bolln v. Nebraska*, 176 U. S. 87, affirming 51 Neb. 581; *Brown v. Walker*, 161 U. S. 606; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 324; *McElvaine v. Bush*, 142 U. S. 158; *Eilenbecker v. Plymouth County*, 134 U. S. 34; *Spies v. Illinois*, 123 U. S. 131; *Edwards v. Elliott*, 21 Wall. 552; *Justices v. Murray*, 9 Wall. 227; *Fox v. Ohio*, 5 How. 410; and *Livingstone v. Moore*, 7 Pet. 551.

These cases put it beyond controversy that the Seventh Amendment does not apply to proceedings in the State Courts. This general ruling does not except trials in State Courts enforcing federal rights. It is inconceivable that careful, accurate thinkers should not have noted this exception had it existed. But on what can such an exception be based? The Seventh Amendment is general. It applies to all trials. If applicable to the trial of federal rights, it is equally applicable to trials of state rights. It provides "in suits at common law where the value, etc., the rights of trial by jury shall be preserved." It would certainly be an unwarrantable construction to interpret this language as applicable to any class of trials other than all trials. Yet it is just this exception which counsel for plaintiffs in error seek.

Moreover, if the Seventh Amendment applies, not to a judiciary, the federal judiciary, but to the cause of action, the *casus foederis*, then we have an entirely new line of demarcation throughout. As it would apply to State Courts only in cases where federal rights are involved, it would apply to Federal Courts only when federal rights are involved. Its application cannot be predicated on the character of the judiciary in some cases and on the subject matter of the litigation in others. It is general in its terms, and if it has to do, not with the court but with the case, it would restrict the mode of trial in Federal Courts only when a case arising under

the Constitution and laws of the United States was being tried. And the interpretation given it, throughout the century, is all wrong. It has not accomplished its purpose in guarding rights tried in Federal Courts and it operates to regulate the mode of trial in State Courts. Yet to this result, the contention of counsel that the subject matter of the litigation governs the application of the Seventh Amendment, necessarily, as it seems to us, leads.

The Seventh Amendment by its terms is directed to a judiciary. It restricts the mode of administration of law, all law, in all classes of cases. If it does not apply to the State Courts, in any class, it applies in none.

(b) The Seventh Amendment Is a Limitation on the Organization of the Federal Judiciary, Not a Limitation on Legislation Creating Rights.

It would seem that the contention of Plaintiffs in Error is suggested in the fact that Congress cannot give a remedy for the enforcement of rights created by it except it provide a jury of twelve. The Seventh Amendment would prevent a law of Congress providing that this right should be tried in a Federal Court before a jury of seven or a verdict other than unanimous. And from this, it is argued that the right is not enforceable in the State Courts, except by a jury of twelve likewise. But there is a confusion here. Rights are created irrespective of the judiciary. A limitation on the administration of law is not a limitation on the law. To illustrate: The Constitution of Virginia requires in jury trials, a jury of not less than seven. But in an action in another state, wherein rights arising under Virginia Statutes are asserted, the procedure need not follow the law of Virginia in reference to jury trials. Yet a Virginia Statute could not create a right cognizable at common law which should be tried in her courts otherwise than by a jury of not less than seven. Again, in an action in Virginia to assert rights arising under the law of Massachusetts where the jury must consist of twelve men,

the procedure is in accordance with the law of Virginia. Yet, that right if enforced in Massachusetts must be tried by a jury of twelve. The constitution protects and regulates the administration of law within the state; it does not undertake to define and determine how rights created shall be tried. The distinction is between legislation and administration through a judiciary. Legislation may exist without a judiciary. It is not inconceivable that rights should be created by a sovereign and yet no judiciary exist for the enforcement of those rights. Indeed such was the case of the government of the United States in its inception. It had no trial judiciary, yet rights created by its legislation were cognizable in the State Courts. The Constitution of the United States has prescribed certain regulations for the procedure in the courts of the United States just as the constitutions of the several states have prescribed certain regulations for the procedure of their courts. But legislation on the rights and duties of those within its jurisdiction is not thereby limited. There is nothing in the Constitution of the United States which requires that a federal law should be enforced in a specific way. That constitution prescribes the way in which all litigation over which its courts take jurisdiction shall be conducted.

It is hard to believe that the Supreme Court speaking through Mr. Justice Van Devanter in the Second Employers' Liability Cases, *supra*, in holding that the right of the State Courts of general jurisdiction to enforce this law created an application of duty to enforce it, intended that this holding should be restricted to courts of states providing the common law procedure in regard to juries. Especially as the court must have been well aware that in many, if not in a majority of states, the common law jury is not provided; and it had had occasion to pass upon the administration of law by the several states when that objection was raised, as in *Maxwell v. Dow*, *Walker v. Sauvinet*, *Barron v. Baltimore* and numerous other cases, cited above. It is submitted that no such restriction on the act is warranted or tenable.

CONCLUSION.

From this discussion it is submitted that: Federal rights are recognized and enforced in the State Courts as are any other rights which form the basis of a litigation, whether arising out of state or foreign law. The Constitution of the United States contains no prohibition to the enforcement of these rights in the State Courts, in accordance with the usual mode of procedure. The Seventh Amendment is a limitation on the administration of law in the Federal Courts, not a limitation on the conduct of litigation, on whatever rights based, in the State Courts. Its phraseology, its history and the construction adopted by the courts all sustain this view.

Respectfully submitted,

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APPENDIX.

Cases and Textwriters and Reviews which have considered this contention:

Winters v. Minn. & St. L. Ry. Co., 126 Minn. 260; 148 N. W. 106.

Chesapeake & Ohio Ry. Co. v. Kelly's Admx., 161 Ky. 655, 171 S. W. 185. In this court No. 473.

Louisville & N. Ry. Co. v. Winkler (Ky.), 173 S. W. 151.

Minneapolis & St. Louis Ry. Co. v. Bombolis (Minn.), 150 N. W. 385. In this court No. 473.

St. Louis & San Francisco Ry. Co. v. H. A. Brown (Okla.), 144 Pac. 1675. In this court No. 399.

Chesapeake & Ohio Ry. Co. v. A. P. Carnahan (Va.), 86 S. E. 865. In this court No. 743.

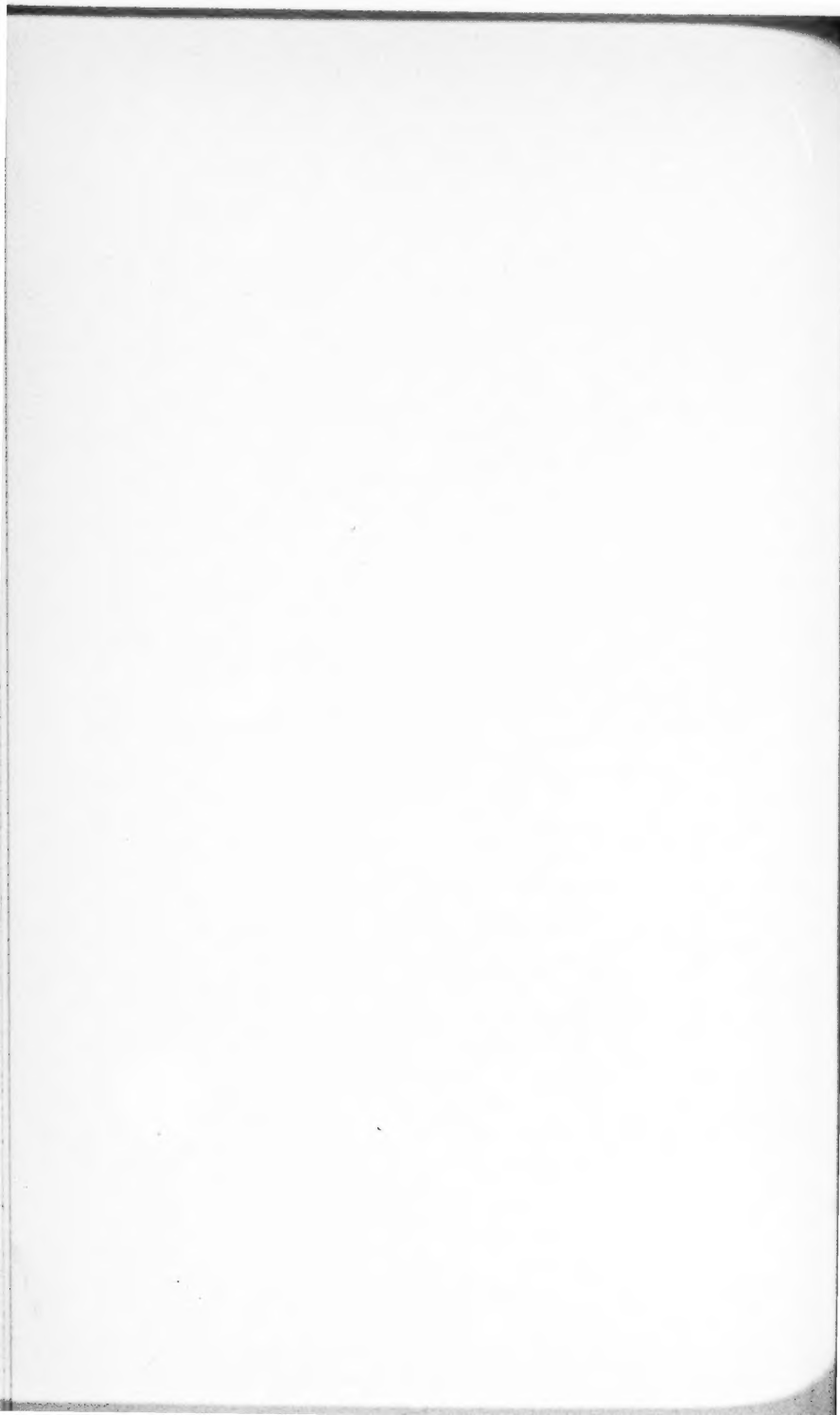
Gibson v. Bellingham & N. R. Co. (Dist. Court Wash.), 213 Fed. 458.

Columbia Law Review, Vol. XV, No. 7, page 616.

Virginia Law Review, Vol. III, No. 4, page 312.

Virginia Law Register, Vol. I, N. S., No. 11, pages 721, 734.

All of which authorities have expressed the view that State Courts, whether providing a common law jury or not, may take jurisdiction of cases involving federal rights and determine the case in accordance with their usual and customary methods of trial.



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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

THE CHESAPEAKE & OHIO RAILWAY CO.

v. } No. 321

ADDIE KELLY, ADMX.

ST. LOUIS & SAN FRANCISCO R. CO.

v. } No. 399

H. A. BROWN.

THE CHESAPEAKE & OHIO RAILWAY CO.

v. } No. 453

JAMES R. GAINES, JR., ADMINISTRATOR, ETC.

MINNEAPOLIS & ST. LOUIS R. CO.

v. } No. 478

GEORGE BOMBOLIS, ADMINISTRATOR.

LOUISVILLE & NASHVILLE R. CO.

v. } No. 485

WM. H. STEWART'S ADMX.

THE CHESAPEAKE & OHIO RAILWAY CO.

v. } No. 743

ASA P. CARNAHAN.

BRIEF FOR PLAINTIFFS IN ERROR ON QUESTION OF SEVENTH
AMENDMENT AS AFFECTING FEDERAL EMPLOYERS'
LIABILITY CASES IN STATE COURTS.

The Court having advanced the above five cases, viz:
Nos. 399, 453, 478, 485 and 743, to be heard at the same
time with No. 321, for the reason that all of these cases
have one point in common, viz: whether in view of the

Seventh Amendment to the Constitution of the United States any case arising under the Federal Employers' Liability Act (35 Stat. at Large, 65, as amended by the Act of 5th April, 1910, 36 Stat. at Large, 291) can be tried in any State court so constituted as not to be able to furnish a common law jury, *i. e.* a jury of twelve required to be unanimous in their verdict, it has been thought best to file one brief dealing with this one point alone. The other points in the cases, if any, will be dealt with in separate supplemental briefs.

ARGUMENT.

(1)

THE WORDS "RIGHT OF TRIAL BY JURY" AS FOUND IN THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHICH IS TO BE PRESERVED IN ALL SUITS AT LAW WHEN THE AMOUNT IN CONTROVERSY EXCEEDS TWENTY DOLLARS, IMPLY A COMMON LAW JURY OF TWELVE MEN, WHOSE VERDICT MUST BE UNANIMOUS.

The Seventh Amendment to the Constitution of the United States provides:

"In suits at common law where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The first sentence of this clause does not define what is comprehended within the term "trial by jury," which is to be preserved. The question, however, as to the meaning

of the words has been very frequently passed upon by this court so that it would seem that there could be no dispute as to what was intended.

In *Capital Traction Co. v. Hof*, 174 U. S. 1, this Court quotes from 41 N. H. 550, as follows:

"The justices of the Supreme Judicial Court of New Hampshire, in an opinion given to the House of Representatives of the State, said: 'The terms 'jury,' and 'trial by jury,' are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly empaneled under the direction of a competent court, sworn to render a true verdict, according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them.'"

And this language was quoted to sustain the statement made by this Court previously in the opinion as follows:

"'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of

twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books."

And this determination of this Court was later affirmed in the following cases:

American Publishing Company v. Fisher, 166 U. S. 464;
Springville v. Thomas, Id. 707;

and has never been departed from so far as we have been able to ascertain, and is further emphasized in the opinions considered hereafter to show that the amendments are limitations upon the powers of Congress.

The foregoing demonstrates, if any demonstration be necessary, that the right to a trial by a jury preserved by the Seventh Amendment to the Constitution, implies a common law jury of twelve men, who must, in order to return a verdict, act unanimously upon the issues submitted to them.

And the phrase "suits at common law" means not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal* rights are to

be ascertained and determined in contradistinction to rights in equity and admiralty.

Parsons v. Bedford, 3 Peters, 433.

(2)

THE RIGHT OF TRIAL BY JURY IS NOT A MERE MATTER OF PROCEDURE, BUT A SUBSTANTIVE RIGHT.

In *Walker v. New Mexico & Southern Pacific Railroad Company*, 165 U. S. 593, Mr. Justice Brewer said at page 596:

"The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice,
* * * Its aim is not to preserve mere matters of form and procedure but substance of right."

Again, Mr. Justice Brewer in *American Publishing Company v. Fisher*, 166 U. S. 464, said at page 468:

"Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof" (unanimity was in question) "is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring."

To the same effect are:

Springville v. Thomas, 166 U. S. 707;

Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

In *Atlantic Coast Line Railroad Company v. Burnette*, 239 U. S. 199, this Court said of the Employers' Liability Act:

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont R. Co. v. White*, 238 U. S. 507."

Norfolk, &c. R. Co. v. Ferebee, 238 U. S. 269.

The right of trial by jury, then, is not mere matter of trial right and procedure (as held in *Gibson v. Belingham & Northern Ry. Co.*, District Court, State of Washington, 213 Fed., 488; *St. Louis & San Francisco R. Co. v. Brown*, Supreme Court Oklahoma, 144 Pac. 1074; *Chesapeake & Ohio Railway Co. v. Kelly*, 171 S. W. 185), determinable by reference to "the law of the forum" (as held in *Winters v. M. & St. L. R. Co.*, Minn., 148 N. W. 106).

It is a substantive right guaranteed a litigant when impleaded by virtue of Federal sovereignty.

Indeed, the fact that the right is a Constitutional one necessarily makes it a substantive right wherever the Constitutional system applies. And that the Constitutional system extends to the States and the State Governments there, of course, can be no question. As Chief Justice Marshall says in *Cohens v. Virginia*, 6 Wheat. 414:

"These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

(3)

THE STATE COURTS DO NOT TAKE JURISDICTION OF THESE
CAUSES AS A MATTER OF COMITY, AS HELD BY THE
STATE SUPREME COURTS IN THE MINNESOTA
AND VIRGINIA CASES, BUT AS AGENCIES
OF THE FEDERAL SYSTEM.

The Minnesota court says that:

"The law of the forum as to what constitutes a lawful jury applies. The character of the cause of action does not determine it."

Winters v. Minneapolis & St. Louis R. R. Co., 148 N. W. Rep. 106.

We are not helped very far along the road we are traveling by the mere assertion that the law of the forum as to what constitutes a lawful jury applies, and that the character of the cause of action does not determine the question. That may be true but if so its truth depends upon some principle or fact which the Supreme Court of Minnesota does not state.

The Supreme Court of Appeals of Virginia approves the language of counsel for the defendant in error, Carnahan, as follows:

"Rights created by the Congress of the United States become a subject of litigation between parties and are enforced as a basis of liability in the same manner as are other rights subsisting between litigants. The United States is a sovereign possessing all the attributes of sovereignty, though exercising its sovereignty over a limited subject-matter. One of the attributes of sovereignty is the authority to create rights and obligations between persons amenable to its jurisdiction. Those rights, once

created, in no way differ from rights created by any other sovereignty."

C. & O. Ry. Co. v. Carnahan, 86 S. E. Rep. 863.

The exact meaning of this statement seems somewhat problematical. Approval of the Virginia court, however, to the language is for the purpose of assuming the very question in issue that with respect to the rights created by the Government of the United States they are to be viewed by the Virginia court as though created by a nation foreign to the State of Virginia, for the real vital part of the opinion of the Virginia court, the premise upon which all of its reasoning must stand or fall, is found in these words:

"The enforcement of a Federal right, as it seems to us, from the authorities, does not differ from the enforcement of rights created by other sovereignties than the United States, in that it draws with it the necessity of enforcement in the manner prescribed by the Federal Constitution for the administration of justice."

That the reasoning of these courts upon such hypothesis is wrong must be true, or else the *Mondou case* in the Second Employers' Liability Cases (223 U. S. 1), evidently was wrongly decided. If the rules and principles of comity are to govern these cases then the highest court of Connecticut must have been right in holding that the courts of that State might decline jurisdiction of actions founded upon the Federal act, because the law embodied a policy and required the application of principles foreign to the policy and laws of Connecticut, and, therefore, the courts of that State were not bound to give effect to the Federal act.

This attitude of the highest court of Connecticut was emphatically rejected by this Court in the *Mondou case*,

in the following clear and unequivocal language, quoting from previous decisions of the Court:

"The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and within its jurisdiction, paramount sovereignty, * * * If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

The discussion is there put beyond dispute, the court holding as follows (p. 59):

"We conclude that rights arising under the act in question may be enforced *as of right* in the courts of the States when their jurisdiction as prescribed by local laws is adequate to the occasion." (Italics ours.)

See, also, *Clafin v. Houseman*, 93 U. S. 130.

It is perhaps not going too far to say that all of the agencies of the States are national for national purposes. As was said by this Court in the *Mondou case* (at p. 57):

“When Congress, in the exertion of the power confided to it by the Constitution, adopted that Act it spoke for all the people and all the States, and thereby established a policy for all.”

In adopting the assistance of the courts of the several States for the administration of the Federal Employers' Liability Act the Congress made those courts, when so acting, Federal agencies, subject to review by the Federal Supreme Court. Striking instances of such review are *St. Louis, Iron Mountain & Southern R. R. Co. v. McWhirter*, 229 U. S. 265, in which the Kentucky Court of Appeals was reversed for misinstruction of the common law doctrine of proximate cause, and *S. A. L. Ry. v. Horton*, 233 U. S. 492, in which the Supreme Court of North Carolina was reversed for misinstruction of the common law doctrine of assumed risk.

In this view, the cases affirming the existence of Federal constitutional limitations on the territorial courts, hereinafter cited, appear to be decisive. It is to be observed that “territorial courts are not courts of the United States within the meaning of the Constitution”: *Good v. Martin*, 95 U. S. 90; *McAllister v. U. S.*, 141 U. S. 174.

Whether as “natural auxiliaries”—as “parts of one whole”—(Hamilton in Fed. No. 82; Chief Justice Marshall in *Cohens v. Virginia*) or by “inference and the general spirit of the Constitution” (*Latter Day Saints v. U. S.*, 136 U. S. 1), or by the “inherent operation of the Constitution” (*Rasmussen v. U. S.*, 197 U. S. 526), or by virtue of express congressional enactments (General Judiciary Act, 26 Stat. at L. 433; Employers' Liability Act, Amendment of 1910; Judicial Code, sec. 28; The Federalist, No. 81) the

State courts in these cases are declared to be agencies of the Federal sovereignty, when they are competent and adequate to the occasion.

(4)

THE RIGHT OF TRIAL BY JURY AS PROVIDED BY THE SEVENTH AMENDMENT IS A FUNDAMENTAL RIGHT WHICH INHERES IN EVERY CAUSE OF ACTION OF COMMON LAW NATURE CREATED BY THE FEDERAL GOVERNMENT AND APPLIES WHEREVER THE LAW IS SOUGHT TO BE ENFORCED WITHIN THE LIMITS OF THE FEDERAL UNION; AND CONGRESS AND THE STATES (IN SUCH CASES) ARE POWERLESS TO TAKE IT AWAY.

The important question to be determined is the scope of the Seventh Amendment.

Is it more than limitation upon the courts of the United States? Does it also limit the legislative and executive power of the Federal Government? In other words, is it binding upon the Congress in the enactment of legislation imposing and defining the duties and liabilities of masters and servants, while both are engaged in interstate commerce? Does it enter into and become a matter of substantive right possessed by all those affected by the Federal Act?

We submit that upon the facts and reasoning of this Court in the cases following, an affirmative answer to these questions necessarily follows:

Walker v. Southern P. R. Co., 165 U. S. 593, 595;
Am. Pub. Co. v. Fisher, 166 U. S. 464;
Springville v. Thomas, 166 U. S. 707;
Bauman v. Ross, 167 U. S. 548-592;
Thompson v. Utah, 170 U. S. 343-350;

Guthrie Natl. Bank v. Guthrie, 173 U. S. 528-537;
Capital Traction Co. v. Hof, 174 U. S. 1;
Maxwell v. Dow, 176 U. S. 581, 596;
Black v. Jackson, 177 U. S. 349;
Downes v. Bidwell, 182 U. S. 244, 270;
Rasmussen v. U. S., 197 U. S. 516-526;
 Second Employers' Liability Cases, 223 U. S. 1, 55, 56,
 57, 58, 59;
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 377;
Central Vermont R. R. Co. v. White, 238 U. S. 507;
Atlantic Coast Line R. R. v. Burnette, 239 U. S. 199.
 In *Am. Pub. Co. v. Fisher*, 166 U. S. 464, in the opinion
 rendered by Mr. Justice Brewer, it is said:

"Therefore, either the Seventh Amendment to the
 Constitution, or these acts of Congress, or all to-
 gether, secured to every litigant in a common law
 action in the courts of the territory of Utah, the
 right to a trial by jury, and nullified any act of its
 legislature which attempted to take from him any-
 thing which is of the substance of that right. Now
 unanimity was one of the peculiar and essential fea-
 tures of trial by jury at the common law. No au-
 thorities are needed to sustain this proposition.
 Whatever may be true as to legislation which
 changes any mere details of a jury trial, it is clear
 that a statute which destroys this substantial and es-
 sential feature thereof is one abridging the right.
 It follows, therefore, that the court erred in receiv-
 ing a verdict returned by only nine jurors, the others
 not concurring."

In the same volume, p. 767, occurs the case of *Spring-
 ville v. Thomas*, in which the opinion was rendered by Mr.
 Chief Justice Fuller. It is said in the opinion:

"In these three cases judgments were entered on verdicts returned by less than the whole number of jurors, by which they were tried. It has been decided by this court that the territorial act of March 10, 1892, permitting this to be done, Laws Utah, 1892, p. 46, was invalid, because in contravention of the Seventh Amendment to the Constitution and the act of Congress of April 7, 1874, 18 Stat. 27, c. 80. * * *

The Supreme Court of the Territory held in *Hess v. White*, 9 Utah, 61 (and the decision was followed in these cases), that the act of Congress of September 9, 1850, 9 Stat. 453, c. 51, sec. 6, the organic act of the territory, vested in the territorial legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. But defendants contended that the act of Congress as thus interpreted was in violation of the Seventh Amendment and the validity of the act was in that way drawn in question. In the view which the Supreme Court took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the Seventh Amendment did not require unanimity of action, the court held in effect that the act of Congress was constitutional although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors. The question involved was not matter of construction of the territorial act, but the court discussed its validity, and this depended on the validity of the act of Congress giving it the scope which the court attributed to it.

In this there was error. In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could

not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

In the case of *Bauman v. Ross*, 167 U. S., on page 592, it is said:

"It was objected to the validity of section 15, that it commits the assessment of benefits upon lands, whether within or without the particular subdivision, benefited by the establishment of a new highway, to 'the same jury' which estimates the compensation or damages, under the previous sections, for taking lands within the subdivision for the purpose of the highway. Some confusion has perhaps arisen from designating the tribunal of seven men, which is to estimate the damage and to assess the benefits, as 'a jury,' when it is in truth an inquest or commission, appointed by the court under authority of the act of Congress, and differing from an ordinary jury in consisting of less than twelve persons, and in not being required to act with unanimity."

Citing the *Fisher* and *Thomas* cases above.

The *Fisher* case is next mentioned in *Thompson v. Utah*, 170 U. S. 343. This was a criminal case and arose in Utah. On page 346, Mr. Justice Harlan, in delivering the opinion of this court says:

"That the provisions of the Constitution of the United States, relating to the right of trial by jury, in suits at common law, apply to the territories of the United States is no longer an open question."

Citing the *Fisher* and *Thomas* cases.

The next case in point of time is that of *Maxwell v. Dow*, 176 U. S. 586. In the course of the opinion Mr. Justice Peckham reaffirms the *Fisher* and *Thomas* cases upon this point by saying:

"That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson v. Utah*, 170 U. S. 343, 349. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury is held."

In *Downes v. Bidwell*, 182 U. S., beginning at the bottom on page 269, in referring to these decisions, this Court said:

"In *Springville v. Thomas*, 166 U. S. 707, it was held that a verdict returned by less than the whole number of jurors was invalid, because in contravention of the Seventh Amendment to the Constitution and the act of Congress of April 7, 1874, c. 80, 18 Stat. 27, which provide, 'that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.' It was also intimated that Congress 'could not impart the power to change the constitutional rule,' which was obviously true with respect to Utah, since the organic act of that territory had expressly extended to it the Constitution and Laws of the United States. As we have already held, that provision once made could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such, and become of no greater authority than an ordinary act of Con-

gress. In *American Pub. Co. v. Fisher*, 166 U. S. 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that territory."

In the case of *Rasmussen v. United States*, 197 U. S., an attempt was made to distinguish the *Fisher*, *Thomas* and other cases from the facts of that case, and to obtain from this Court a distinct declaration that the provisions of the Constitution involved here could only be extended to the territories of the United States by direct act of Congress. This view, however, was rejected by this Court, and in the opinion beginning near the top of page 526, it is said:

"The argument by which the decisive force of the cases just cited is sought to be escaped is that as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore, the decisions must be taken to have proceeded alone upon the statutes and not upon the inherent application of the provisions of the Fifth, Sixth and Seventh Amendments to the District of Columbia or to an incorporated territory. And upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the Sixth Amendment does not apply to the territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the territories with which the cases were respec-

tively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. It is true that in some of the opinions both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made, and the cases proceeded upon a line of reasoning, leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution."

In *Slocum v. New York Life Ins. Co.*, 228 U. S., at page 377, this court says:

"The Constitution of the United States, as originally adopted, conferred upon this court, by Article III, Section 2, 'appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make,' but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law and evoked so much criticism on that ground that the first Congress proposed to the legislatures of the several States the Seventh Amendment, which was promptly ratified. 1 Stat. 21, 97; Story on the Constitution, secs. 1763, 1768."

Referring again to the *Bidwell case* (182 U. S.), Mr. Justice Brown in the opinion, at page 268, quoting Mr. Justice Bradley, in the *Mormon Church case*, 136 U. S., said:

"Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

If this is true with reference to legislation affecting the people of these territories of the United States for how much stronger reason must it be true with respect to legislation affecting the people of the United States? Indeed, in the latter case the provisions become expressly applicable.

Again, in the concurring opinion written by the present Chief Justice, it is said on page 294:

"Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."

As we understand it this language was intended to apply to rights such as are secured by the Seventh Amendment, as well as other amendments to the Constitution.

Again, in the *Slocum case* (228 U. S.) occur these further statements germane to the subject now under consideration. It is said on page 397, speaking to the effect that the constitutional right of trial by jury is not invaded by a statute authorizing the court to enter a compulsory non-suit against the plaintiff for any insufficiency in his evidence when he is not thereby prevented from suing again on the same cause of action:

"Assuming, without so deciding, that they should be accepted and followed in respect of the particular matter to which they are addressed, that is, the granting of an involuntary non-suit which leaves the merits unadjudicated, they afford no justification whatever for overruling or departing from the repeated decisions of this court, reaching back to the beginning of the last century, wherein it uniformly has been held (a) that we must look to the common law for a definition of the nature and extent of the right of trial by jury, which the Constitution declares 'shall be preserved'; (b) that the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court; (c) that the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury which is no less a part of the tribunal charged with the trial than is the court, and (d) that when the issues have been so tried and a verdict rendered they cannot be re-examined otherwise than on a new trial granted by the court in which the first trial was had or ordered by the appellate court for some error of law affecting the verdict."

And with reference to the objection that the Court was but adhering to a mere rule of procedure at common law, it was said in answer on page 399:

"First, the terms of the amendment and the circumstances of its adoption unmistakably show that one of its purposes was to require adherence to that rule, which in long years of practice had come to be regarded as essential to the full realization of the right of trial by jury; and, second, the right to a new trial in a case such as this, on the vacation of a favorable verdict secured from a jury, is a matter of substance and not of mere form, for it gives opportunity, as before indicated, to present evidence which may not have been available or known before, and also to expose any error or untruth in the opposing evidence."

And further with reference to the value which has always been attached to the right as inhering in those entitled thereto, the Court said on page 387:

"The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. * * * *This constitutional right this court has always guarded with jealousy.*" (Italics ours.)

In the dissenting opinion written by Mr. Justice Hughes, and concurred in by JJ. Holmes, Lurton and Pitney, it is said on page 408:

"The Seventh Amendment, it cannot be doubted, deals with matters of substance and not with mere matters of form. It guarantees the right of trial by jury, but it does not raise forms of motions or merely model details to the dignity of constitutional rights. In numerous particulars, common law practice has been altered by statute in many States and the new procedure of the so-called Code States has been followed, as near as may be, by virtue of the act of Congress, in the courts of the United States. When the question is raised of invasion of the constitutional right, we must always look to the substance of what is done and not to mere names or formal changes. * * *

The substantial thing is that the common law recognized that the function of the jury was to deal with controversies of fact. If there was a question of law it was for the court."

And to show the binding effect of this decision as limiting action by Congress, so far as any attempt might be made to infringe the right secured to the individual by these constitutional provisions the dissenting opinion says, on page 400:

"The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the Federal courts in Pennsylvania in applying, under the Conformity Act, the provisions of the State law, but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and expense of litigation. It cannot be gainsaid that such a conclusion

is not to be reached unless the constitutional provision compels it."

It seems to us that upon consideration of the reasoning set forth in the numerous opinions heretofore referred to, the conclusion is irresistible that the guaranty of the Seventh Amendment as well as the other amendments to the Constitution, by force of that instrument enter into and become a right of every person whose civil liabilities are regulated, modified or declared by the legislative power of the United States, and that it is perfectly apparent that Congress in legislating with respect to the rights, duties and liabilities of masters and servants, where both are engaged in interstate commerce, did not by virtue of the restrictions of the Constitution possess the power to provide for the trial of actions brought to determine the liabilities arising out of such regulatory act in any other than a court of which a common law jury is a component part. That by reason of the Constitution, Congress was wholly devoid of power to provide for the trial of actions founded upon the Federal Act in any court sitting within the United States, constituted in any other manner, whether the same receive its powers from the United States or from the State where the action is sought to be tried.

In construing similar provisions found in the Constitutions of the several States, it has been uniformly held that the guarantee of the Constitution becomes a part of the civil right of the citizen or of all who are subject to the power of the State, and that such right cannot be impaired by legislation either directly or under the guise of modifying, changing or creating remedies.

The following cases will be found to deal with the subject:

Whallon v. Bancroft, 4 Minn. 70;

Norval v. Rice, 2 Wis. 22;

Gaston v. Babcock, 6 Wis. 503;

Ross v. Irving, 14 Ill. 471;

Baltimore, &c. R. Co. v. Ketring, 122 Ind. 5, 23 N. E. 527;

Swarz v. Ramala, 63 Kan. 633; 66 Pac. 649;

State v. Doty, 32 N. J. L. 403;

Byers v. Com., 42 Pa. St. 89.

As illustrating the holdings of such courts with respect to this matter the following from the opinion in the *Whallon case* (4 Minn. 70), is illustrative, the court says (Section 4, Article 1) :

"The effect of this clause in the Constitution is, first, to recognize the right of trial by jury as it existed in the territory of Minnesota at the time of adoption of the State Constitution; and, second, to continue such right unimpaired and inviolate. It neither takes from nor adds to the right as it previously existed, but adopts it unchanged. Wherever the right of trial by jury could be had under the territorial laws it may now be held and the legislature cannot abridge it, and those cases which were tryable by the court without the intervention of a jury may still be so tried. The same clause in substance, and sometimes in words, has found its way into the Constitution of most of the new States and has received from their courts the same interpretation that we now place upon it, whenever it has been subjected to judicial scrutiny, as far as we have been able to ascertain."

(5)

THE JUDICIAL POWER OF THE UNITED STATES EXTENDS TO
THE CASUS FOEDERIS IN WHATEVER FORUM PRESENTED,
AND NECESSARILY THE LIMITATIONS UPON THAT
POWER EXTEND ALONG WITH IT.

For the underlying principle, which is applied in the cases cited under the last heading, we have but to recur to the genesis of our institutions.

"If there are such things as political axioms," said Mr. Hamilton (The Federalist, No. 80), "the propriety of the judicial power of a government being co-extensive with the legislative, may be ranked among the number."

See *Cohens v. Virginia*, 6 Wheat. 384.

Under Const. U. S., Article III, section 2, it is provided,

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority * * *."

By virtue of the Employers' Liability Act, Congress having entered a field delegated to it under the Constitution, all State laws upon the subject are superseded.

Gulf v. Hefley, 158 U. S. 98, 104;

Northern P. R. R. Co. v. Washington, 222 U. S. 370;

Second Employers' Liability cases, 223 U. S. 1;

Michigan C. R. R. Co. v. Vreeland, 227 U. S. 59.

The judicial power of the United States being co-extensive with the power of Congress and extending, under the express provisions of the Constitution to cases arising under "the laws of the United States," it likewise follows that the judicial power of the States is excluded in such cases; and that State courts take jurisdiction of these cases merely as Federal agencies as above shown.

In fact, with respect to the enactment in question the entire State governments necessarily disappear, as separate sovereignties: and being parts of the Federal system, become "natural auxiliaries" to the enforcement of the "supreme law of the land." There are here no States except as "parts of one whole," that is, the United States; and the Federal government is in entire possession of this

particular field by virtue of the exercise of its paramount authority.

Second Employers' Liability cases, supra (223 U. S., p 50).

In the great case of *Martin v. Hunter*, 1 Wheat. 304, it was held that the appellate power of the Supreme Court of the United States extends to cases tried in State courts involving Federal questions.

In reaching this conclusion the learned Justice Story held that the judicial power of the United States extended to the case, and therefore the case was within the appellate power of the Supreme Court of the United States.

In the course of his opinion he said, referring to the Constitution (p. 338) :

"The words are 'the judicial power (which includes the appellate power) shall extend to *all cases*,' etc., and 'in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.' It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends."

See, also, *Cohens v. Virginia, supra*.

In order to establish the propriety of the appellate power of the United States courts extending to the case the conclusion had to be reached that the judicial power extended to the *case*, and thereby there was necessarily established the fundamental principle upon which the argument now rests.

If the case were not within the judicial power of the United States no appeal would lie, as it would be nothing short of a political anomaly for one sovereign to exercise any sort of supervision over the judiciary of another. It was necessary to bring the court under the judicial system

of the United States—to extend its judicial power to the case, and this the great jurist did not hesitate to do.

And so in the case of *Cohens v. Virginia*, *supra*, it was strenuously urged that the Supreme Court of the United States could not exercise its appellate power in any case over the judgment of a State court and that the courts of the States might pass upon questions involving the supreme law of the land without being subject to review or control by the agencies established by that supreme law. This argument, however, has always been rejected by this court and its fallacy is probably nowhere better pointed out than in the clear and convincing language of Chief Justice Marshall (6 Wheat. star, page 413).

In speaking of the second objection to the jurisdiction of this court, the Chief Justice said:

“This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the Federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the Constitution, the argument fails with it.

This hypothesis is not founded on any words in the Constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of State courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.”

The great Chief Justice then examines the alleged unreasonableness and total incompatibility, and shows with the closest of reasoning and the most convincing logic that the position contended for was wholly untenable. He then quotes approvingly this language from the Federalist:

"The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of national decision."

Speaking further and with reference to preserving from violation Federal rights in State Courts, the Chief Justice said (p. 388):

"We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, in-

stead of acting through the instrumentality of State governments. But, ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion? Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?"

And we suggest, when the liability is imposed by legislation enacted pursuant to that Constitution by the supreme law making power of the supreme government, why do they not require that they be enforced as to the liability so imposed in the manner prescribed by the supreme law of the land for the administration of justice?

If the judicial power of the United States extends over these cases, then, of course, the limitations upon that power extend along with it.

That the Seventh Amendment is a limitation upon the judicial power of the United States, seems not to be disputed.

The first eight amendments to the Constitution have been said to be a "Federal bill of rights," the lack of which in the Constitution was the subject of universal criticism. (See *The Federalist*, No. 84, 3 Story on Const., sec. 1862.)

"Whenever then a general power is granted to a government," says Mr Justice Story, "which in its actual exercise may be dangerous to a people there seems a peculiar propriety in restricting its operations, and in excepting from it some at least of the most mischievous forms, in which it may be likely to be used." (*Idem*, sec. 1858.)

These articles are restrictions upon the powers of the government and reservations of rights to the people.

The Seventh Amendment is indeed a limitation upon all the powers of the general government.

Barron v. Baltimore, 7 Pet. 243;

Holmes v. Jennison, 14 Pet. 582;

Fox v. Ohio, 5 How. 434;

Spies v. Illinois, 123 U. S. 166;

Brown v. Walker, 161 U. S. 606.

It is, of course, idle to say that this constitutional limitation upon the judicial power of the General Government can be evaded or destroyed by its Legislative Department or the States: for to do so would be to destroy the Constitution itself and, in the present case, a sacred right guaranteed to the "people of the United States" wherever the immense power of the Federal Government seeks to impose a liability.

Marbury v. Madison, 1 Cranch, 137;

McCulloch v. Maryland, 4 Wheat. 316;

Cohens v. Virginia, *supra*.

We think it is really conceded in the opinion of the Supreme Court of Appeals of Virginia that the Seventh Amendment is a limitation on the judicial power of the United States, whose conclusion seems to be that it is a limitation solely upon that power—though the court erroneously assumes that the judicial power of the United States is only exercised through the Federal courts.

In showing the necessity of including the State courts when their jurisdiction is invoked in Federal cases, in the Federal system, Mr. Hamilton said:

"Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." (Quoted with approval by Chief Justice Marshall in *Cohens v. Virginia*, *supra*.)

Leading up to the quotation, Chief Justice Marshall in the case last cited said:

"The propriety of entrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the union, has not, we believe, as yet, been drawn in question. It seems to be a corollary from this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the State tribunals. If the Federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws and treaties of the United States; and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws and treaties of the United States, is not confided particularly to their judicial department but is confided equally to that department and to the State courts, however they may be constituted."

The argument there made applies, with great force, to the question we are now discussing, particularly when we consider that Congress has already denied the right of removal.

The trial of questions of fact arising under the Federal Employers' Liability Act, if our contention is incorrect, will be relegated to forty-nine different systems of jurisprudence.

In Florida there may be a verdict of six jurors; in Virginia seven jurors constitute a jury; in Kentucky, Oklahoma and Ohio nine out of twelve jurors may bring in a verdict; in Minnesota and Washington five-sixths of the jury may bring in a verdict; and if the jury disagree the judge himself decides the case in Louisiana. It

is not inconceivable that in some of these forty-nine different systems of jurisprudence a jury trial may be altogether abolished, while others may adopt the views of a distinguished publicist and submit the question finally to a vote of the people.

And when the question reaches this court by a process of appeal it cannot be "otherwise re-examined, than by the rules of the common law," the object of which provision is to *preserve common law procedure* in addition to the *substantive right of trial by jury*. (Cooley's Prin. Const. Law, p. 265; *Slocum v N. Y. Life Ins. Co.*, *supra*.)

Could the framers of the Constitution have ever contemplated such incongruous procedure?

Or, to state the question somewhat differently: Assuming for the sake of argument that the Seventh Amendment and the other constitutional limitations upon the power of the Federal sovereign do not inhere in this creation of the Federal sovereign, then the curious situation is presented of a creation of a constitutionally limited body, the Congress, administered by agencies of that body freed from constitutional limitation, which agencies are in turn reviewable by a supreme tribunal constitutionally limited as is the Congress. Thus a cause of action, from its creation to the last step in administration, would be now restricted, now freed, and again restricted by the constitutional limitation of the Seventh Amendment.

A construction leading to such results must be erroneous. It would enable Congress to nullify the Seventh Amendment and prostrate the entire Constitution at the feet of every State in the Union. Congress might give exclusive original jurisdiction of these cases to the State courts, or do what is virtually the same thing, exactly what it has done—leave it optional with the plaintiff to bring the case in a State court and prevent the defendant from removing the case to the Federal courts. Congress might next deny the right of appeal to the Supreme Court of the United States and thus a right contained in the Federal Bill of

Rights and one, the encroachment upon which has always been "watched with great jealousy" (*Parsons v. Bedford, supra*), will have been destroyed. This it is said in *Cohens v. Virginia*, 6 Wheat., p. 419 (quoting from the Federalist) would be "entirely inadmissible." And that case further shows that *for the very purpose of protecting these Federal rights* a right of appeal (or removal) must be allowed in such cases, or else "the local courts must be excluded from a concurrent jurisdiction in matters of national concern."

That the attributes of the judicial power of the United States inhere in the trial of cases in State courts under the act of Congress is exemplified in *Central Vermont Ry. v. White*, 238 U. S. 512.

It is there held that the court would not follow the rule of the State on the question of the burden of proof as to contributory negligence but would follow the rule laid down by its own courts

As said in *Norfolk, &c. R. Co. v. Ferebee*, 238 U. S. 269:

"A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of procedure."

In *Walker v. New Mexico, &c. R. Co.*, 165 U. S. 593, it was said:

"The seventh amendment, indeed, does not attempt to regulate matters of pleading or practice
* * * Its aim is not to preserve mere matters of form and procedure but substance of right."
Springville v. Thomas, supra.

See also *A. C. L. R. Co. v. Burnette, supra.*

It may perhaps be said that the answer to the argument now advanced is that the seventh amendment is not a limitation upon the whole judicial power of the United States; that it is a limitation only upon that part of the judicial power of the United States exercised by the Federal courts created by Congress; that this is to be gathered from the last clause of the seventh amendment which says that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law;" that this clause being expressly confined to the Federal courts indicates that the first clause of the amendment should be equally so confined.

That the limitation is upon the whole judicial power of the United States, unless there is something indicating a contrary intention will doubtless be admitted.

The wording of the amendment, so far from supporting the contention advanced rather tends to refute it.

The first clause of the amendment mentions no court, but says generally, "In suits at common law" the trial by jury shall be preserved; the latter clause specifies the courts in which the cause shall not be otherwise re-examined than according to the rules of common law. The fact it was considered necessary in the latter clause to limit its application to particular courts indicates of course, that the first clause is not so limited.

Furthermore in cases in which the second clause of the amendment has been before the court it has been held that they are separate and independent.

Parsons v. Bedford, 3 Peters, 433.

The Justices v. Murray, 9 Wall. 274.

C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 142.

Capitol Traction Co. v. Hof, 174 U. S. 1.

As a matter of history these clauses, substantially as they now stand, were introduced as two amendments by Mr. Madison in the first Congress, and were subsequently, for

convenience doubtless, embodied in a single article. (*Cap. Traction Co. v. Hof, supra.*)

Accordingly it has been held that the first clause is applicable to the territorial courts though they are not "courts of the United States" within the meaning of the second clause (see *Good v. Martin; McAllister v. U. S., supra.*).

An examination of the cases in the Supreme Court of the United States, where it is said that the Seventh Amendment "affects only trials in courts of the United States," shows that none of the cases so cited is one involving the enforcement in a State court of a cause of action created by an Act of Congress. All of those cases involved trials of causes created by the constitutions or statutes of the States in which the causes were tried, or causes created by the common law. Manifestly, therefore, the question we have here was not presented, and could not have been presented, in any of those cases. In other words, the question we have here is *res integra*, so far as the decisions of the Supreme Court of the United States are concerned. Of course, everyone will concede that the Seventh Amendment is a restraint upon the Federal Government only, and not upon the States. This being so, it necessarily follows that where a cause of action is created by the Constitution or statute of a State, it is triable in the courts of that State in accordance with its laws, freed from the trammels of the Seventh Amendment, or any other of the first ten amendments to the Constitution of the United States. But it is a *non sequitur* that causes of action created by Congress may be so tried. Congress can create no cause of action which, either by its terms or in its administration in the courts, can escape the limitations imposed upon both Congress and the courts by any of the first ten Amendments to the Constitution, including, of course, the Seventh Amendment, which preserves the right of trial by jury as at Common law.

CONGRESS HAS NOT GRANTED JURISDICTION OF CASES
UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT
TO STATE COURTS WHICH DO NOT ANSWER
THE REQUIREMENTS OF THE SEVENTH
AMENDMENT.

It is everywhere admitted that in causes which grow out of and are peculiar to the Constitution, exclusive jurisdiction can be vested by Congress in the Federal courts. (*Clafin v. Houseman, supra*; 3 Story on Const., sec. 1748; *The Moses Taylor*, 4 Wall. 411.) This being true, Congress can limit the jurisdiction of the State courts, as the greater includes the lesser power. Therefore it has the power to extend the Seventh Amendment to those courts in the trial of Federal causes, and to limit the jurisdiction of State courts to those so constituted as to answer its requirements.

See *Am. Pub. Co. v. Fisher*, 166 U. S. 464.

Walker v. So. Pac. R. Co., 165 U. S. 595.

The amendment of 1910 provides:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no cases arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Section 28 of the Judicial Code provides:

"That no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State

court of competent jurisdiction shall be removed to any court of the United States."

Before the amendment of 1910 State courts had jurisdiction by virtue of the general jurisdictional act, which gave the Circuit Court of the United States jurisdiction, "concurrent with courts of the several States" (26 Stat. at L. 433; *Mondou Case, supra*).

The State and Federal courts are, by these enactments, invested with "concurrent jurisdiction," and the State courts to which jurisdiction is granted are to be courts of "competent jurisdiction."

Concurrent jurisdiction means equal jurisdiction: *State v. Sinnott*, 89 Me. 41, 35 Atl. 1007. Again, concurrent jurisdiction has been declared to be a jurisdiction having the same authority: *Royer v. Bonair*, 2 Okla. 553, 37 Pac. 1078.

A competent court must be a court having all the attributes necessary to a constitutional trial. Thus in *Clarke v. Commonwealth*, 29 Pa. 129, the court held that a competent court for the trial of a person indicted must afford a panel of jurors constituted according to law and that such a panel was as necessary an ingredient as the presiding judge.

These words "competent" and "adequate" are frequently used in connection with the jurisdiction of State courts in Federal matters (*Claflin v. Houseman; Second Employers' Liability Cases, supra*).

A court of "competent jurisdiction" implies a court whose authority and machinery is adequate to the occasion

In the case of *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534, the court had occasion to construe section 5392 of the Revised Statutes of the United States, providing that every person who, having taken an oath before a "competent tribunal, officer or person" in any case in which a law of the United States authorizes an oath to be admin-

istered, that he will testify truly, etc., and contrary to such oath testifies falsely to that which he does not believe to be true, shall be guilty of perjury and punished.

An oath was alleged to have been falsely made by a cashier of a national bank in a report to the Comptroller of the Currency before a notary public of the State of Missouri.

Said the Court:

"The controlling question is as to the authority of the notary to administer the oath, upon the falsity of which the indictment is laid.

"It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to prejury at common law, or subject the party taking it to prosecution for the statutory offense of wilfully false swearing. 1 Hawk, P. C. b. 1, c. 27, section 4, p 430 (8th ed.), by Curwood; Roscoe's Cr. Evid. (7th Am. ed.), p. 817; 2 Whart. Crim. Law, section 2211; Arch, Crim. Pr. and Pl. (8th ed.), p. 1722. If, therefore, Curtis, at the time the several oaths alleged to be false were taken, was not authorized by the laws of the United States to take them before a notary public, he cannot be proceeded against under section 5392. The statute, in conformity with an established rule of criminal law, expressly declares that the oath must be taken before some 'competent tribunal, officer, or person.' This does not necessarily mean that the tribunal by which the oath is administered shall have been created by the government which required it to be taken, nor that the officer who administers it shall be an officer of that government. But the statute does mean that the oath must be permitted

or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. So that the underlying question is whether the notary public, whose commission is from the State, was, at the respective dates, of the oaths taken by Curtis, authorized by the laws of the United States, to administer such oaths.

"This question we are constrained to answer in the negative. We are not aware of any act of Congress which gave such authority to notaries public in the different States at the several dates given in the indictment."

The word "competent" was there construed in accordance with our contention in the instant case; that a "competent" officer or person to administer an oath in a case where a law of the United States authorized an oath, as used in the statute, means a person authorized by the laws of the United States "to administer oaths in respect of the particular matters to which it relates."

See, also, *U. S. v. Hall*, 131 U. S. 50.

Therefore when Congress refers to a court of "competent jurisdiction" it means a court competent under the laws of the United States—it can speak in no other language—and, therefore subject to the provisions of the Federal Constitution.

Furthermore the plaintiff in these causes has the power of the choice of the forum, and if the contention hereinbefore advanced be not sound, he can at his pleasure choose the forum and at his option deprive the defendant of the protection afforded by the Federal Constitution.

See *Cohens v. Virginia*, *supra*.

Such a result says the court in that case would be "entirely inadmissible"—especially, we may add, since these cases are not removable to the Federal courts.

Judicial Code, sec. 28; *Kansas City v. Leslie*, Adm. 238 U. S. 599.

In *Central Vermont R. Co. v. White*, *supra*, the court holds that "Congress in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of the decisions" of the Federal courts as to burden of proof and other such matters touching Federal rights, even in State courts. If this be true with respect to Federal decisions with how much greater reason is it true with respect to a substantive right contained in the Constitution itself?

Again: Of what advantage would be a rule as to burden of proof as to facts if the tribunal which is to weigh the evidence according to that rule under the supervision of a court, may be taken away? Why keep a form if the substance has fled?

Moreover, the inference that the Federal decisions on the general questions of negligence are to be read into the statute arises from an implication, whereas the application of the right of trial by jury is due to that principle and something more. Such a right, as above shown, is *expressly* extended to the case by the use of the words State courts of "competent jurisdiction."

And still again, it may be truthfully asserted that Federal jurisprudence, under all the authorities we have heretofore cited, knows no such thing as a "court" for the trial of Federal law cases (as distinguished from admiralty and equity jurisdiction) which does not provide a common law jury. Accordingly, when the Federal statute speaks of State courts for the trial of such cases it means courts at least equipped with such a jury, and cannot in this regard mean anything else.

From the foregoing it will be seen that the Seventh Amendment requires a jury of twelve men, whose verdict must be unanimous; that the right of trial by such a jury is not a matter of procedure, but a substantive right, to

be enforced as such by the State courts and not by such courts as a matter of comity; that Congress has not granted jurisdiction of cases under the Federal Employers' Liability Act to State courts which do not answer the requirements of the Seventh Amendment, and that Congress could not do so, else a right regarded as of such vital importance that it was reserved to the people in the Constitution can be taken from them by an Act of Congress turning over the enforcement or the preservation of said reserved right to a court which cannot comply with the constitutional requirement.

The court will find, in an appendix, the Constitution and statutes of the respective States whose jury laws are involved in the foregoing cases.

For the foregoing reasons the court is asked to reverse and remand the above entitled causes.

Respectfully submitted,

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APPENDIX.

Provisions of the Constitution and Statutes of the States of Virginia, Kentucky, Minnesota and Oklahoma, In Relation to Jury Trials.

VIRGINIA.

CONSTITUTION OF VIRGINIA, ARTICLE I, SECTION 11..

"No person to be deprived of property without due process of law; trial by jury to be held sacred.

That no person shall be deprived of his property without due process of law, and in controversies respecting property and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred; but the General Assembly may limit the number of jurors for civil cases in Circuit and Corporation courts to not less than five in cases now cognizable by Justices of the Peace or to not less than seven in cases not so cognizable."

VIRGINIA CODE, 1904.

"Sec. 3166. *Waiver of Trial by Jury; Number of Jurors for Trial of Civil Cases:* In any case, unless one of the parties demand that the case be tried by a jury, the whole matter of law and of fact may be heard and determined, and judgment given by the court. In civil cases the jury shall consist of five persons in cases now cognizable by justices of the peace, and of seven in cases not so cognizable. And in any case in which the consent of the plaintiff and defendant shall be entered of record it shall be lawful for the plaintiff to select one person, who is eligible as a juror, and for the defendant to select another, and for the two so se-

lected to select a third of like qualifications, and the three so selected shall constitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven; provided, this section shall not be so construed as to effect in any way the empanelling of special juries as provided in section thirty-one hundred and fifty-eight. (1870-71, p. 53; 1902-3-4, p. 605)."

"Sec. 3158. *How Special Juries Formed*: Any court, in a case where a jury is required, may allow a special jury, which shall be formed in the following manner: The court shall order such persons to be summoned, as it shall designate for the purpose, and from those summoned, a panel of twenty qualified jurors, free from just cause of exception, shall be made, from which sixteen shall be chosen by lot. Thereupon, the parties or their counsel, beginning with the plaintiff, shall alternately strike off one from the sixteen so chosen, until the number is reduced to twelve, who shall compose the jury for the trial of the cause. If the parties or their counsel decline or fail to strike off any from the sixteen, or if, after one or more has been stricken off and the number remaining is greater than twelve, the party or his counsel, entitled next in order to strike off, decline or fail to do so, then a jury of twelve for the trial of the cause shall be chosen by lot from the sixteen or the number remaining as aforesaid, as the case may be. (1874, p. 133.)"

"Sec. 3154. *Examination of Juror As To Interest, Prejudice, &c.; If Not Indifferent Another To Be Supplied*: The court shall, on motion of either party in any suit, examine on oath any person who is

called as a juror therein to ascertain whether he is related to either party or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that cause. And in every case the plaintiff and defendant may each challenge one juror peremptorily, where the jury consists of seven. (1852-3, p. 45; 1902-3-4, p. 944; 1904, p. 73.)"

KENTUCKY.

CONSTITUTION OF KENTUCKY.

"Sec. 248. *Grand Jury; Number; Trial Jury in Inferior Courts; Majority Verdict:* A grand jury shall consist of twelve persons, nine of whom concurring, may find an indictment. In civil and misdemeanor cases, in courts inferior to the Circuit Courts, a jury shall consist of six persons. The General Assembly may provide that in any or all trials of civil actions in the Circuit Courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

KENTUCKY STATUTES (CARROLL).

"Sec. 2268. *Three-Fourths of Jury May Make Verdict:* That in all trials of civil actions in the

Circuit Courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

MINNESOTA.

MINNESOTA GENERAL STATUTES, 1913.

"Sec. 7805. *Five-sixths of Jury May Render Verdict, etc.*: In all civil actions or proceedings in any court of record of this State, after twelve hours' deliberation, the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and the clerk shall enter such time in his records.

"Sec. 7806.—*Same—How Signed*—Where the verdict is agreed to by the full membership of the jury the foreman only shall sign the verdict, when less than the full number agree on the verdict the same shall be signed by all the jurors who concur therein, and the clerk of said court shall enter on his minutes the number of said jurors concurring in said verdict."

OKLAHOMA.

Section 19 of Article 2 of the Constitution of Oklahoma, pp. xcv and xcvi of Volume I, Revised Laws of Oklahoma, 1910:

"Sec. 19. The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and

criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, a jury shall consist of six men. This section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgment of courts not of record in civil cases concerning causes of action involving less than twenty dollars. In civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein."

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JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 321.

THE CHESAPEAKE & OHIO RAILWAY

COMPANY, - - - - - Plaintiff in Error,

versus

ADDIE KELLY, as Administratrix of MAT

KELLY, Deceased, - - - Defendant in Error.

Reply to Separate Brief of Defendant in
Error.

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H. T. WICKHAM,
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Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 321.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
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ADDIE KELLY, AS ADMINISTRATRIX OF MAT
KELLY, DECEASED, - - - *Defendant in Error.*

REPLY TO SEPARATE BRIEF OF DEFENDANT
IN ERROR.

Counsel for defendant in error seem to think that the failure of plaintiff in error to call the attention of the trial court to its want of jurisdiction would operate to confer jurisdiction on it of the subject-matter, and cite for this *Birney v. Haim*, 2 Litt. 262, and *Home for Incurables v. City of New York*, 187 U. S. 157. Neither of these cases so holds.

In *Birney v. Haim* there was a judgment in favor of plaintiff in the Circuit Court on the first trial, from which an appeal was prosecuted to the Court of Appeals, where the judgment below was reversed and the cause remanded for proceedings in accordance with that opinion (*Birney v. Haim*, 3 Mar. 322). Upon the second trial there was

another judgment in favor of plaintiff, from which an appeal was prosecuted to the Court of Appeals, and, on the second trial, defendant attempted to raise the question of the jurisdiction of the court. The Court of Appeals ruled against this attempt, but did so upon the familiar principle that the opinion on the first appeal, whether right or wrong, becomes the law of the case upon subsequent appeals. That this was the ground of its opinion is shown by the following language on page 266 of 2 Litt.:

“The order remanding the cause then for further proceedings, must be considered as settling that it is right for the court below to proceed.”

The first appeal adjudicated the question of the jurisdiction of the lower court, and consequently this could not be relitigated on the second appeal. In the case at bar the “law of the case” is yet to be determined.

This court declined to accept jurisdiction in *Home for Incurables v. New York*, upon the ground that the record did not show that any Federal right had been set up or adjudicated in the courts of the State, and, unless there had been a ruling against plaintiff in error on a Federal right, there was, of course, nothing on which to base its writ of error. In the case at bar the Federal question was presented by the petition for rehearing, was duly considered by the Court of Appeals of Kentucky, and ruled against plaintiff in error, and this court has often decided that this confers jurisdiction upon it to review the action of the State Court:

Leigh v. Green, 193 U. S. 79, 85.

McKay v. Kalyton, 204 U. S. 458, 463.

Grannis v. Ordean, 234 U. S. 385, 392.

Defendant in error has, therefore, cited no authority in conflict with those cited on pages 9-10 of our separate brief holding that it is never too late to object to the jurisdiction of the court over the subject-matter of the action.

Counsel's suggestion that plaintiff in error should not be permitted to question the jurisdiction of the lower court on the ground that it is now too late for defendant in error to choose another forum is not well founded. If this action was tried in the wrong forum, it was not the fault of plaintiff in error. In accordance with Rule 1 of this court, only such parts of the record as are material to the errors assigned have been brought up, and, consequently, all of the proceedings below are not shown. A reference to Kelly's Admr. v. C. & O. R'y Co., 201 Fed. Rep. 602, however, will show that this action was removed by plaintiff in error into the District Court of the United States for the Eastern District of Kentucky, whose jurisdiction could not be questioned under the Seventh Amendment, and that it was remanded from that court at the instance of defendant in error.

There is an apparent intimation in the brief of defendant in error that counsel for plaintiff in error purposely refrained from objecting to the jurisdiction of the State Court until it was too late for defendant in error to select another forum. There is no justification for this intimation. In the Petition for Rehearing (Pr. Rec., 182)

we frankly stated that the reason the point was not presented sooner was because it was not brought to our attention until after the opinion of the Court of Appeals had been delivered. This is the sole reason the point was not presented earlier.

On page 11 of their separate brief, counsel for defendant in error state that we cited *Railway v. McGinnis*, 228 U. S. 173, and *C. & O. R'y Co. v. Dwyer's Admr.*, 157 Ky. 590, on the "present value" rule contended for in our separate brief, and that neither of said cases sustains or "squints at supporting plaintiff's argument." We cited neither of these cases, but on pages 15-16 of our separate brief we did cite numerous cases directly in point and which fully sustain our contention.

On page 15 of their separate brief, counsel for defendant in error state that the earning capacity of the decedent was proven to be \$192.00 a month and not contradicted. The testimony (Pr. Rec., 98-9) showed that about a year after the death of the decedent the wages of engineers in his class were increased about \$20.00 per month to \$192.00 per month. Decedent, therefore, at the time of his death, was only earning \$172.00 per month, and the testimony as to this increase was incompetent, because it was pure conjecture as to whether or not he would have received it. He might have been discharged before that time and have been receiving at the end of the year seventy or eighty dollars per month in some non-hazardous employment.

Counsel cite numerous Kentucky cases to show that plaintiff in error was not entitled to have amounts pay-

able over a possible period of 22 years reduced to their present value on account of being paid at once, and then inquire how the court is to know that they were not so reduced. Our answer is that we know this because there was no instruction authorizing the reduction of the loss to present value. Plaintiff in error requested (Pr. Rec., 17, 18) that the jury be told to reduce the loss to its present value, but the trial court refused to do so. It was evidently the intention of the trial court that the loss should not be so reduced.

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